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Supreme Court, U.S.
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IN THE OFFICE OF THE CLERK

Supreme Court of the United States

D.G., Guardian Ad Litem for J.G., a Minor,

Petitioner,

v.

NORTH PLAINFIELD BOARD OF EDUCATION, RICHARD GRECO, Director of Pupil Services, JANE DELANEY, Supervisor, Special Education, and MARILYN BIRNBAUM, Superintendent,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPERIOR COURT APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

FRANCINE A. GARGANO
20 Shawnee Drive, Suite B
Watchung, New Jersey 07069
(908) 753-2079

Attorney for Petitioner

218715

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

The New Jersey Supreme Court, by denying Certification, affirmed the Appellate Court's ruling to uphold the Trial Court's decision where (a) after four years of consolidation the case was severed with the IDEA portion being sent back to the OAL which adversely impacted the Petitioner, J.G.'s (hereafter J.G.) case; (b) J.G. was denied the right to have his trial remain in Somerset County where it had been for four years because the Court refused to either, install a ramp to the witness box so plaintiff could testify with everyone else or put a table on the floor and require all witnesses to testify from that location, but instead transferred the matter to a different County which had access; (c) approving the Trial Court Judge's derogatory comments, and the derogatory comments and behaviors by Respondent, North Plainfield Board of Education, et al.'s (hereafter North Plainfield Board of Education) trial counsel, regarding J.G.'s disability during trial; and (d) agreeing with the Trial Court's refusal to vacate the verdict and order a new trial where there was *prima facie* evidence of violations of the American with Disabilities Act, 42 U.S.C.A. § 12101-12213 (hereafter ADA).

Four questions are presented:

1. Does an action brought pursuant to the Individuals with Disabilities Education Act, 20 U.S.C.A. § 1400-1487 (hereafter IDEA) have to be heard in an administrative setting or can it be heard in a state court in situations like here, where the IDEA action that was started in the Office of Administrative Law (hereafter

OAL), was consolidated with the New Jersey Law Against Discrimination Act, N.J.S.A. 10:5-1, et seq. (hereafter NJLAD) and ADA action in the Superior Court by order of the Court and with the consent of the parties?

2. Does the ADA require a Court to make reasonable accommodations for a litigant in a wheelchair to testify from the witness box like everyone else, so they can stay within their own County, or does it allow the Court to send the trial to a different County which is accessible, thereby denying the litigant the right to be heard in the County in which individuals who are not in a wheelchair would have their litigation heard?

3. Is it a violation of the Fourteenth Amendment to the U.S. Constitution, commonly known as the Equal Protection Clause, and the ADA for a Judge to make comments about the movements and behaviors of a disabled party during trial, which are part of the individual's disability, and for the Judge to allow the adversary to do likewise thereby impacting the perceptions of the jury particularly in a case that resolves around the said disability?

4. Does the ADA require a Judge to order a new trial when there is *prima facie* evidence of discrimination and violations of the ADA?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	iv
TABLE OF CITED AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	7
CONCLUSION	22

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Superior Court Of New Jersey, Appellate Division Decided April 9, 2008 ..... 1a

Appendix B — Opinion Of The Superior Court Of New Jersey, Somerset County, Law Division Dated June 22, 2005 ..... 35a

Appendix C — Order Of The Supreme Court Of New Jersey Denying Petition For Certification Filed July 15, 2008 ..... 46a

Appendix D — Transcript Of Proceedings Of The Superior Court Of New Jersey, Law Division, Civil Part, Somerset County Dated March 17, 2006 ..... 47a

Appendix E — Order Of The Superior Court Of New Jersey, Law Division, Hunterdon County, Civil Division Filed December 20, 2005 ..... 58a

TABLE OF CITED AUTHORITIES

Page

CASES:

Anderson v. Little League Baseball, Inc., 794 F. Supp. 342 (D. Ariz. 1992) 20

Brannick v. State of New Jersey, United States District Court for the District of New Jersey, 2006 U.S. Dist. 13

Coleman v. Zatechka, United States District Court for the District of Nebraska, 824 F. Supp. 1360, 24; 1993 U.S. Dist. 19

Covington v. Knox County Sch. Sys., 205 F.3d 912 (6th Cir. 2000) 9

Crocker, 873 F.2 at 936 Tennessee Secondary School Athletic Association, 873 F.2d 933 (1989) 9

Donoho v. Smith County Bd. of Educ., No. 00-5214, United States Court of Appeals for the Sixth Circuit, 21 Fed. Appx. 293; 2001 U.S. App. August 9, 2001, Filed, *Donoho v. Smith County Bd. of Educ.*, No. 00-5214, United States Court of Appeals for the Sixth Circuit, 21 Fed. Appx. 293; 2001 U.S. App., August 9, 2001 9

Lane v. Tennessee, 315 F.3d 680 (2003) 13

Cited Authorities

Page

Pardini v. Allegheny Intermediate Unit, 420 F.3d 181; 2005 U.S. App., November 12, 2004, on remand at, U.S. Dist. (W.D. Pa., Jan. 17, 2006) US Supreme Court, *cert. denied*, 547 U.S. 1050, 126 S. Ct. 1646, 164 L. Ed. 2d 353 (2006) 9

Tennessee v. Lane, 541 U.S. 509; 124 S. Ct. 1978; 158 L. Ed. 2d 820 (2004) 13

Waterman v. Markett-Intermediate School District, 539 F. Supp. 361 (W.D. Mich. 1999) ... 9

W.B. v. Matula, 67 F.3d 484 (3d. Cir. 1995) 10

CONSTITUTIONAL PROVISIONS:

Fourteenth Amendment to the U.S. Constitution 7, 13, 17

STATUTES AND REGULATIONS:

28 U.S.C. § 1257(a) 1

Individuals with Disabilities Education Act, 20 U.S.C.A. § 1400-1487 i

New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq. ii

Cited Authorities

Page

Title II of the American with Disabilities Act, 42 U.S.C.A. § 12101-12213 i

Title II of the American with Disabilities Act, 42 U.S.C.A § 35.150 ..... 1, 12

28 C.F.R. Pt. 35 ..... 20, 21

OPINION BELOW

The New Jersey Supreme Court, docket number 62,649 denied Petitioners Petition for certification on July 15, 2008 (App. C). That petition being brought for certification and review of the April 9, 2008 opinion of the Appellate Division, docket number A-3988-05 (App. A). The Appellate Court's opinion affirmed the lower court's decision dated March 17, 2006 denying J.G.'s motion for a new trial (App. D). In so doing the court confirmed the verdict by a jury against J.G. and in favor of North Plainfield (App. E). None of these decisions have been published.

JURISDICTION

The New Jersey Superior Court Appellate Division affirmed the lower Court's decision on April 9, 2008. The New Jersey Supreme Court rendered its decision on July 15, 2008 denying Petitioner's Petition for Certification. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

American with Disabilities Act, 42 U.S.C.A § 35.150

> (a) *General.* A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities

American with Disabilities Act, 42 U.S.C.A. § 12132

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Fourteenth Amendment to the U.S. Constitution

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. When this matter started J.G. was a minor. He has cerebral palsy and has always been in regular education in regular school. While there were always problems with the administration and J.G.'s Individualized Education Program (hereafter IEP) the problems escalated in fifth grade. After J.G.'s mother filed a DYFUS charge against the school, and an aide, for dumping chemicals on him, the school retaliated.

When it came time for J.G. to go into sixth grade he was told that the school was not accessible so he would not be allowed to attend with his peers. The school actually wrote a letter to this affect and it took a demonstration in front of the school to get J.G. to be admitted.

There were issues of IEP violations, refusal to make bathrooms ADA compliant, the aides were untrained, etc. Administrators were telling J.G.'s mother that J.G. belonged in a C.P. School and if she continued to demand compliance from them, they would put him there.

2. On June 15, 2000 a complaint was filed in the OAL. On June 7, 2001 a motion for leave to file an Interlocutory Appeal was made and granted by the Somerset County Superior Court. On June 28, 2001 a complaint was filed in the Somerset County Superior Court. The complaint encompassed the same issues as were in the OAL and a few others. It updated everything through the then current school year. It included the refusal of North Plainfield Board of Education to provide J.G. with an accessible bathroom and broken

and obsolete wheelchair lifts. There were charges of violations of the ADA and NJLAD.

Judge Hoens consolidated the cases and this was consented to by the parties. It was memorialized again with Judge Gasiorowski, also with the consent of the parties. The case remained consolidated for four years.

North Plainfield Board of Education's insurance company became insolvent which caused delays in the proceedings and eventually they were removed from the case. The claim was taken over by New Jersey Property Liability Insurance Guaranty Association (NJ PLIGA).

The Defendant's new attorney, John Schmidt, on the eve of trial, moved for a dismissal of the counts of the complaint dealing with the OAL matters saying they were moot. Judge Kumpf denied the motion but instead *sua sponte* severed the cases and sent the OAL portion back to the OAL.[1] He argued that under federal law, the case had to proceed through the administrative channels and under no circumstances could it be heard in Superior Court (App. B).

3. Prior to the start of the trial, J.G.'s counsel made a request to the Court to make accommodations for J.G. who is in a power wheelchair. He needed access to the Courthouse, a courtroom that was accessible and accessibility to the witness box so he could testify in the same place and same manner as all other witnesses. The

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1. The OAL Judge determined that all the matters were moot. The case has been appealed to the United States District Court for the District of New Jersey.

Court refused to make the accommodations and instead forced J.G. to request to have the case transferred to a County that was accessible. The motion was granted and the case was moved to Hunterdon County.

4. During the trial, the defense counsel complained about the movements and behavior of J.G. These included laughing and moving in his chair. Ironically, North Plainfield Board of Education spent many years with J.G. and was fully aware of how his disability worked with his emotions and they also knew that he needed to move around in his wheelchair for comfort and health. So these attacks by the attorney were no more than an attempt to prejudice the jury.

This was a great tactic to harass J.G. as the Judge admonished him. Throughout the trial, the Judge commented on J.G. to the jury or to his counsel. J.G. was forced to repeatedly leave the courtroom because he could not move around freely in his wheelchair. Other people in the Courtroom with wheelchairs and scooters were allowed to move about freely in their chairs and, of course, people without disabilities could move about in their chairs without comment or stares. Whenever J.G. did move, defense counsel would stop what he was doing and glare at J.G. until he was finished. This intentional act would bring the attention to J.G. Although this cannot be seen by the transcripts, counsel admitted same before the Appellate Division.

5. After the trial, the jury returned a verdict in favor of North Plainfield Board of Education. On March 17, 2006 J.G. moved to vacate the verdict because there was *prima facie* evidence of discrimination and ADA

violations. At trial, a letter was produced from the North Plainfield Board of Education to J.G.'s attorney telling her that the school that J.G. was supposed to attend was not accessible and therefore alternative placement would have to be found. This was confirmed during trial. Additionally, J.G.'s expert's report made a recommendation that the teacher's bathroom be made into a unisex/handicap bathroom. The North Plainfield Board of Education maintained at trial that 1) what the expert requested could not be done and, 2) despite this they had created a unisex bathroom. They maintained this despite evidence to the contrary. After the trial they actually did follow the recommendations as set forth by the expert thereby proving that they were not in compliance and they actually perjured themselves during the trial. This was denied.

6. The matter was appealed to the New Jersey Appellate Court on April 6, 2006 and they decided in Respondents' favor on April 9, 2008.

7. After the granting of an extension on the time to file on May 30, 2008, a Petition for Certification was submitted on June 6, 2008 to the New Jersey Supreme Court. The Certification was denied on July 11, 2008.

REASONS FOR GRANTING THE PETITION

This Petition should be granted because the decision below flies in the face of this Court's prior rulings with regard to the ADA as well as other Federal Court rulings. Congress has made it clear, and this Court has agreed, that the Fourteenth Amendment of the Constitution protects individuals from being discriminated against and through Title II of the ADA; it has been applied to people with disabilities.

If this Court does not step in now and make it clear that; 1) educational facilities cannot discriminate against people with disabilities and; 2) the legal system also cannot discriminate against people with disabilities, it will be thwarting the strides that have been made with the ADA. The public policy of wanting to include people with disabilities in everyday life and thereby make them productive members of our society needs to be protected. This Court must be ever vigilant of cases where this is not happening.

I. REVIEW IS WARRANTED BECAUSE THE STATE COURT IMPROPERLY APPLIED THE LAW REGARDING THE VENUE FOR IDEA CASES.

Judge Kumpf, the Judge who was to preside over the trial, severed the OAL portion of the case, four years after it's consolidation, and sent it back to the OAL for disposition.

When the trial was transferred to Judge Buchsbaum, a motion was again made on this issue but it was denied.

The Appellate Division decided that the case was improperly brought to the Superior Court and therefore it should be severed. The New Jersey Supreme Court denied review.[2]

This result came about after a motion was made by North Plainfield Board of Education's counsel to have the IDEA matters dismissed due to J.G. not exhausting his administrative remedies. However, the cases were originally consolidated by Judge Hoens with the consent of the parties, and later clarified in a consent order signed by Judge Gasiorowski. Everyone believed that the cases should be together. The trial preparation, witnesses, discovery, etc, were based upon the cases being consolidated. J.G. could not get the relief he was entitled to for the four years while the case was pending in Superior Court.

When the cases were severed, the parties were instructed that no part of the IDEA case could be addressed at trial. This was impossible because the issues were exactly the same. J.G.'s counsel abided by the requirement but the defense counsel did not. Over repeated objections, the Trial Judge allowed North Plainfield Board of Education's attorney to bring in IEP's and other information from the IDEA case. The result was that J.G.'s attorney's hands were tied and ultimately they lost the case.

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2. The Appellate Division was incorrect on this because review of the OAL decisions are the jurisdiction of the County Superior Court, not the Appellate Court.

In his decision, Judge Kumpf opined, "One wonders given the nature of the relief contemplated under the IDEA, what jury question is presented for trial or for determination by the court given the lack of administrative determination to review." (App. B at 44a).

Judge Kumpf based his entire decision on *Waterman by Waterman* v. *Markett-Intermediate School District*, 539 F. Supp. 361 (W.D. Mich. 1999). However, the Courts have carved out exceptions; see *Donoho v. Smith County Bd. of Educ.*, No. 00-5214, United States Court of Appeals for the Sixth Circuit, 21 Fed. Appx. 293; 2001 U.S. App. August 9, 2001, Filed, *Donoho v. Smith County Bd. of Educ.*, No. 00-5214, United States Court of Appeals for the Sixth Circuit, 21 Fed. Appx. 293; 2001 U.S. App., August 9, 2001, which stated,

> There are 'narrow exceptions to the exhaustion requirement.' *Crocker, 873 F.2 at 936.* 'Exhaustion is not required if it would be futile or inadequate to protect the plaintiff's rights. Nor is exhaustion required if the plaintiffs were not given full notice of their procedural rights under the IDEA.' *Covington*, 205 F.3d at 917 (citations omitted).

Also, in *Pardini v. Allegheny Intermediate Unit*, 420 F.3d 181; 2005 U.S. App., November 12, 2004, on remand at, U.S. Dist. (W.D. Pa., Jan. 17, 2006) US Supreme Court, *cert. denied*, 547 U.S. 1050, 126 S. Ct. 1646, 164 L. Ed. 2d 353 (2006) the Court stated,

> The District Court reached the merits of the Pardinis' complaint without requiring

> exhaustion of administrative remedies under the IDEA because of the 'bewildering bureaucratic nightmare,' they had faced in dealing with the AIU. *280 F. Supp. 2d at 454*. We assume that the court was concluding that exhaustion would be futile and that failure to exhaust was therefore excused. See *W.B. v. Matula*, 67 F.3d 484, 495-96 (3d. Cir. 1995).

It is clear from the case law that Judge Kumpf was incorrect. Obviously all the Judges and attorneys before him believed the proper forum was in the Superior Court. It had come to the Superior Court by way of Interlocutory Appeal. Judge Hoens obviously felt that the exhaustion of remedies was futile or inadequate. It was Judge Kumpf who misapplied the law. He should never have tried to second guess the Judges who had spent so much time on the case.

The decision below conflicts with prior decisions of this Court and this Court needs to send a clear message that the exhaustion of remedies is not always necessary or appropriate. Given the nature of the case, the allegations involved and the fact that this Court has continually worked to uphold the rights of individuals with disabilities, it is necessary to make sure that the lower Courts are following these directives. The New Jersey Courts' disregard for these principles presents a substantial issue justifying Supreme Court review. Additionally, since there are so many children coming through the system who are disabled, this decision will impact upon more than just this case.

II. REVIEW IS WARRANTED TO SETTLE AN ISSUE CONCERNING THE APPLICATION OF TITLE II OF THE ADA AS IT APPLIES TO COURTHOUSES.

A. APPLICATION BY THE TRIAL COURT OF THE ADA CONFLICTS WITH TITLE II OF THE ADA AND THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

J.G.'s trial was to be held in the Old Courthouse in Somerville, New Jersey before the Honorable Judge Kumpf. The wheelchair accessible doorway is not manned so access is denied to people using wheelchairs. The courtroom that was to be used had a witness box that was elevated and was not wheelchair accessible.

It was important to J.G.'s case that he 1) have access to the courtroom itself, and 2) that he be able to testify in the same physical location as all of the other witnesses. It was even more important in this instance because the case being heard dealt with the issue of J.G. wanting to be treated the same as the other children in his school as well as access issues.

Somerset County has a procedure that needs to be followed to request accommodations under the ADA. Counsel must contact the Somerset County Civil Division.

J.G.'s counsel made that contact and requested that the door be opened to the courthouse for J.G., a ramp be placed to the witness box when J.G. testified or, in the alternative, that a table be placed on the floor from

where all witnesses could then testify. J.G.'s requests were denied. The administration felt that since the Hunterdon County Courthouse was wheelchair accessible and the witness box was on the floor, there was no need to accommodate J.G. Thus, J.G. was forced to make a motion for a change of venue. Judge Kumpf granted said motion on October 13, 2005.

J.G. did not want to change his venue. J.G. should not have had to change his venue. But for his disability, J.G.'s trial would have been heard in Somerset County; the County where he resides, the County in which the Respondent school was located.

J.G. addressed this issue on appeal and the Appellate Division opined, that since the trial was transferred to Hunterdon County at J.G.'s request, he could not complain. Additionally, they stated that a "litigant is entitled to a fair trial, not a perfect one" (App. A at 19a-20a).

Sadly, the Appellate Division totally ignored the fact that the Court refused to make reasonable accommodations to J.G. pursuant to Title II of the ADA. They believed that since J.G. could not prove that this change affected the outcome of his case, that J.G. was not entitled to a new trial.

Title II of the ADA, § 35.150 referring to existing facilities says, "(a) *General.* A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." Additionally, The Supreme Court has made it clear in

Tennessee v. Lane, 541 U.S. 509; 124 S. Ct. 1978; 158 L. Ed. 2d 820 (2004), the U.S. Supreme Court affirmed the Sixth Circuit Court of Appeals finding that

> (a) the due process clause of the *Constitution's Fourteenth Amendment* protected the right of access to the courts, and (b) the evidence before Congress when it had enacted Title II had established that physical barriers in courthouses and courtrooms had had the effect of denying people with disabilities the opportunity for such access,

Citing *Lane v. Tennessee*, 315 F.3d 680; 2003.

The length to which courts could and should go for litigants can be seen in. *Brannick v. State of New Jersey*, United States District Court for the District of New Jersey, 2006 U.S. Dist. Here, the Court moved the courtroom to one where videotaping was available and set aside a separate room for the Plaintiff who had chemical sensitivities. They made sure that there were no chemicals, rugs, etc. in the room to accommodate her illness of chemical sensitivity. Ironically this case was in the same Vicinage as the case at bar.

In the present case, they had much less to do to accommodate J.G. and they refused. It is important that this Court make the lower Court's realize that the denial of reasonable accommodations to individuals with disabilities in the courthouse is not only a denial of their constitutional rights to a fair trial but it also sends a message to others involved in the litigation that they are less deserving individuals. It is particularly

important in cases like the one at bar where the matter being litigated deals with access issues, ADA compliance and discrimination laws.

Moving a case to another County, which is wheelchair accessible, cannot be seen as acceptable when the accommodation requested is so minimal. Litigants should not have to prove that their trial would not be a fair one if they do not receive the accommodation. They are entitled to the accommodation as a matter of right.

In furtherance of J.G.'s assertion is the fact that just this year, Somerset County, in one of its courtrooms, has installed a wheelchair lift that goes to the jury box.

If the ADA did not require this, and the right for a disabled person to testify from the jury box did not exist, the County never would have made this change.

J.G. should not have to prove what the jury thought about the case being in Hunterdon County as opposed to Somerset County. He couldn't anyway because the Trial Judge refused to allow the attorneys to speak with the jury after the trial. Surely, a litigant's rights to reasonable accommodations is not predicated on the fact of whether or not they will lose the case, but rather the issue is that they are human beings and should be afforded the same rights as those without disabilities.

However, to suggest that a person is not affected by having his case moved some twenty-six (26) miles away from his home compared to one that is eleven (11) miles from there, especially when you are disabled and you require the assistance of other people for all of your

needs, is ludicrous. This is not to even address the other factors like the different makeup of the Counties, the different demographics of the people, etc.

The Somerset County Superior Court, and later the New Jersey Appellate Court, disregarded the law in this area. This presents a substantial issue, which justifies the review by the Supreme Court. The New Jersey Supreme Court has clearly showed that it will not get involved in this issue and this leaves future litigants who are confined to a wheelchair in a position of either testifying from a different physical location than everybody else, or requesting a change of venue.

Thus, the importance of the Supreme Court resolution of this issue does not just apply to this case but rather to cases being heard all over the country.

III. REVIEW IS WARRANTED BECAUSE THE STATE COURT IMPROPERLY APPLIED THE LAW REGARDING TREATMENT OF INDIVIDUALS WITH DISABILITIES IN THE COURTROOM.

At the outset of the trial, the tone was set for J.G. and his disability. After opening statements, the defense attorney complained to the Judge that J.G. was being distracting during his statement. The Judge commented that he noticed it too. The Judge was concerned about the courtroom "decorum" being ignored by J.G. J.G. was admonished and told to keep himself in check or be banished from the Courtroom. This so upset J.G. that he was never comfortable in the courtroom again.

J.G. has cerebral palsy. He spends his time in a wheelchair. His feet are tied in with straps. His electric wheelchair has a lot of features that can help his comfort. He can press buttons and it will recline him. Since he cannot move, shift, or stretch like the rest of us, he relies on his wheelchair to do the work. Unfortunately, when you use the controls, the wheelchair makes beeping sounds. After the other attorney started his attack on J.G, he became reluctant to move. In fact, when he did, the other attorney would stop, look at J.G., wait for him to finish, and then go on with what he was doing.

J.G.'s disability is a neurological one. It plays on his emotions and responses as well as his physical abilities. He has what is referred to as a startle reflex where he will jump if he is frightened or startled. Loud noises or voices will make him jump. Also if someone intimidates him he will react. He can sometimes laugh or cry in response to something said that would trigger an emotion.

Once the Judge accepted that J.G.'s responses and movements were not intentional, he continually made comments to the jury. Due to this insensitivity to J.G.'s disability, J.G. was forced to leave the courtroom on a regular basis during the trial. The Judge wanted to again comment on this, but over objection by J.G.'s counsel, he relented.

It is interesting to note that there were members of the disability community present during parts of the trial who came out to support J.G. and his cause. The supporters came in electric wheelchairs and scooters. Their assistive devices also made noises. Nobody

complained about them. Also, one of the defense witnesses, Linda Ciufo, indicated to the Court that she had a back problem and might need to stand and move around during her testimony. The Judge had no problem accommodating her and no big issue was made of her request.

The New Jersey Appellate Court did not see that the Judge's comments, and the admitted actions of defense counsel, were discriminatory toward J.G. The New Jersey Supreme Court, by denying J.G.'s petition, concurred. However, this Court has consistently held that the due process clause of the Fourteenth Amendment entitles a litigant to a fair trial. Title II of the ADA requires reasonable accommodations so that a person can enjoy the benefits of a service or program.

How does a person get a fair trial when they're every movement or emotion is questioned, commented upon and criticized? J.G. could not even be present at all stages of his trial. He had to spend so much time trying to control a disability over which he has no control; he could not even be himself. He was self-conscious, the attorneys were self-conscious of his movements and to suggest that the jury was not made to be equally as conscious of these differences is ridiculous. The suggestion was implanted in their minds that J.G was disruptive, annoying and otherwise a problem. No wonder why they came back with a verdict for the Respondents. They had a poor perception and understanding of J.G.'s disability.

It is imperative that the Supreme Court addresses this issue. Lower Courts must be made to understand

that they cannot make derogatory comments about people with disabilities. Can you imagine a Judge saying to the jury, "just ignore the Ebonics coming from the plaintiff's mouth", or telling a gay couple they could not hold hands in a courtroom. Well that's the equivalent of what was done here and it is up to this Court to make it clear that it will not be tolerated.

IV. REVIEW IS WARRANTED TO SETTLE AN ISSUE AS TO WHAT CONSTITUTES PRIMA FACIE EVIDENCE OF VIOLATION OF THE ADA.

At the conclusion of J.G.'s trial, the jury rendered a verdict against him (App. E). This was done even though there was *prima facie* evidence of discrimination and violations of the ADA. As a result, J.G. moved to set aside the verdict and order a new trial. Judge Buchsbaum denied it on March 17, 2006. In denying it the Judge stated that he did not want to reopen the case because of the bad public policy ramifications. He says this when counsel presents evidence that North Plainfield Board of Education was not being forthright with the Court and the jury about the bathroom situation. As evidence J.G.'s counsel submitted proof that after the trial they did what they said could not be done with regard to the bathrooms.

Additionally, during the trial a letter from North Plainfield Board of Education to J.G.'s counsel was admitted into evidence, which said that Somerset School was not ADA compliant and that J.G would not be permitted to attend. During the trial, the Judge noted that it was an admission by the Respondents of not being

in conformity with the law. Also, there was another document that referred to J.G. as an "impediment" in the hallway. All of this, coupled with the fact that the defendant, Richard Greco, admitted making comments to the affect that J.G. should be with other children with cerebral palsy (implying to J.G.'s mother that he wanted him removed from the school) showed a particular animus toward J.G.

Title II of the ADA applies to schools as well as Courts. The schools are required to make the facilities accessible to people in wheelchairs. Here the school refused. There was no dispute on this issue.

The IDEA entitles a child with a disability to an education like everyone else. The IDEA cannot be implemented if the facility is not accessible. Allowing cases like this one to stand is to mandate that a school system does not have to make a building accessible for children with disabilities and in this way get around the IDEA.

In *Coleman v. Zatechka*, United States District Court for the District of Nebraska, 824 F. Supp. 1360, 24; 1993 U.S. Dist. The defendants suggested that in order for plaintiff to be "qualified" to participate in the roommate assignment program she must not utilize more than half the space in the room. The Court noted

> [The provisions of the ADA] are intended to prohibit exclusion and segregation of individuals with disabilities . . . based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes

> about individuals with disabilities. Consistent with these standards, public entities are required to ensure their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do.

28 C.F.R. Pt. 35, App. Defendants' assumption that plaintiff's use of a wheelchair causes her to utilize more than half the space in a dormitory room falls far short of the individualized assessment that is required by the ADA. See also *Anderson v. Little League Baseball, Inc.*,794 F. Supp. 342 (D. Ariz. 1992) (blanket policy of prohibiting coaches in wheelchairs from being on the field violates the ADA; baseball league needs to make individualized assessments). *Supra* at 25.

The Court went on to say,

> The ADA's Findings and Purposes illustrate that Congress, in enacting the statute, aimed to bring people with disabilities into society's mainstream, to cause the kinds of interaction which might facilitate recognition of the true equality of human worth as between individuals—regardless of disabilities. In contrast, the university's policy at issue here of excluding plaintiff from the roommate assignment program, how ever well intentioned it may have been, sanctions the attitude that students with disabilities are less desirable and suggests that others should not be required to live with them. Such standoffishness places less value on the

> human worth of individuals with disabilities—because of their disabilities. As implemented, the policy unnecessarily separates students with disabilities from those without disabilities and thus strikes at the essence of the ADA and specifically violates the statute's stated purpose "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."

Supra at 39.

The same thing happened to J.G. and the Lower Courts have ignored it. The Court needs to hear this case and make it clear to educational facilities that this is not acceptable. If not, children all over the United States with disabilities may be forced out of mainstream education by schools with physical barriers.

Review is warranted in this case because it will not only impact the Petitioner, but will have far reaching effects.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

FRANCINE A. GARGANO
20 Shawnee Drive, Suite B
Watchung, New Jersey 07069
(908) 753-2079

Attorney for Petitioner

APPENDIX A — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DECIDED APRIL 9, 2008

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-3988-05T5

D.G., Guardian Ad Litem for J.G., a Minor,

Plaintiff-Appellant,

v.

NORTH PLAINFIELD BOARD OF EDUCATION, RICHARD GRECO, Director of Pupil Services, JANE DELANEY, Supervisor, Special Education, and MARILYN BIRNBAUM, Superintendent,

Defendants-Respondents.

Argued December 5, 2007 — Decided April 9, 2008

Before Judges Parker, R.B. Coleman and Lyons.

The opinion of the court was delivered by

PARKER, J.A.D.

Plaintiff D.G., guardian ad litem for her son J.G., appeals from an order entered on March 17, 2006 denying her motion for a new trial or judgment

notwithstanding the verdict (JNOV). After careful consideration of plaintiff's arguments, we affirm.

J.G. has suffered from cerebral palsy since infancy. In June 2000, at the end of his fifth grade year, J.G.'s mother, D.G., filed a due process petition with the Department of Education (DOE), claiming that the North Plainfield Board of Education (Board) failed to comply with J.G.'s individual education plan (IEP). Subsequent to filing the administrative action, plaintiff filed a complaint in the Law Division against the Board and several individual employees, claiming that J.G. was a victim of discrimination in violation of the Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1 to -42, the Americans With Disabilities Act (ADA), 42 *U.S.C.A.* §§ 12101 to 12213, and the Federal Civil Rights Act, 42 *U.S.C.A.* §§ 1983 and 1985.

When plaintiff filed an interlocutory appeal from the administrative action in the Law Division, the then-presiding judge of the Civil Part in Somerset County consolidated the administrative and Law Division actions "for administrative purposes pending further order of the [c]ourt." The consolidation order stayed both actions for ninety days pending the parties' pursuing voluntary mediation. The mediation was unsuccessful and the cases were subsequently consolidated "for all purposes including discovery and trial."

The Law Division matter was tried over twenty days in November and December 2005. At the close of

plaintiff's case, the trial judge dismissed one count of the complaint, which alleged intentional infliction of emotional distress. The jury decided in favor of defendants on all remaining counts.

The facts relevant to this appeal are as follows. J.G. was classified as orthopedically impaired and enrolled in Stony Brook School from kindergarten through fifth grade. The boy's grandmother, R.G., served as his in-classroom aide for the first five years of his education. A number of accommodations were made for J.G., who was wheelchair-bound, to attend classes in the two-story building. R.G. was given a key to the school elevator, a bathroom on the second floor was made handicap accessible, as was a bathroom in the nurse's office. Computers, special chairs, mats and hand-held recorders were purchased for the boy's use, and he was provided with a second set of school books to keep at home. J.G.'s teachers gave him modified assignments and extended test times. His class sizes were limited and he received preferential seating and stretch breaks.

Through the end of the third grade, J.G. received physical therapy, occupational therapy and speech therapy, plus adaptive physical education. Prior to fourth grade, however, plaintiff demanded that J.G. be provided with "conductive education," an all-encompassing therapy program, in lieu of his usual therapies, and threatened to file a due process petition if the Board did not accede to her request. The Board hired Erica Nagy, the conductive educator specified by

plaintiff, and gave her permission to work with J.G. in his classrooms, the hallways, the gym and a small therapy room at the Stony Brook School. The Board also paid for and transported J.G. to a special summer camp run by Nagy beginning the summer prior to fifth grade and every year thereafter.

In the Spring of 1999, prior to J.G.'s fifth grade year at Stony Brook, plaintiff requested that the boy not be required to take his tests in the hallway, that he receive transportation to participate in band and chorus, that he be admitted into Stony Brook's ASK program, and that he be provided with a male in-classroom aide. The principal at Stony Brook, Antoinette Plewa, allowed J.G. to participate in the ASK program, an after-school homework program designed for underachieving children, even though he did not qualify because his grades were very good. Plaintiff further requested that the male aide be permitted to attend J.G.'s conductive education summer camp so that he would be appropriately trained when school began. The Board agreed to the summer training.

Ricardo Beckford was hired as J.G.'s aide. Beckford had some experience with cerebral palsy children and had worked as an aide in the district previously. He had vacation plans over the summer, however, and was unable to attend the camp. At the beginning of the next school year, the Board authorized Nagy to exceed her contract hours to train Beckford as an additional accommodation to plaintiff.

Appendix A

Initially, J.G. and Beckford got along well. After a period of time, however, J.G. complained to his mother that Beckford fell asleep in class, failed to get J.G. to the bathroom in time and failed to properly pack his school bag with his homework. J.G. also claimed that Beckford turned off the power wheelchair and yelled at him to the point where J.G. was afraid. Plaintiff contacted Principal Plewa, who spoke with Beckford and J.G.'s teachers regarding the boy's allegations.

Beckford acknowledged that he had a night job but denied falling asleep in class. He denied turning off the wheelchair but noted that he was sometimes forced to intervene because J.G. traveled too fast or crashed the chair. Beckford also acknowledged that J.G. wet himself about twice a week but explained that this occurred when the boy was socializing with friends and waited too long to use the bathroom. J.G.'s teachers denied seeing Beckford sleeping or signs of urine indicating that the boy had wet himself. After completing her investigation, Plewa concluded that most of J.G.'s allegations were unsubstantiated. She did, however, direct Beckford not to turn off the wheelchair unless the boy was in danger.

In November 1999, plaintiff and J.G. attended a meeting regarding J.G.'s allegations about Beckford. Plewa, Richard Greco, Director of Pupil Services, several of J.G.'s teachers and Jane Delaney, the Special Education Supervisor were at the meeting. When the meeting became contentious and J.G. began to cry, plaintiff wheeled him out of the room, ending the

meeting. The relationship between J.G. and Beckford continued to deteriorate after the meeting and plaintiff filed a complaint with the Division of Youth and Family Services (DYFS), alleging that Beckford physically abused the child. After investigating the incident, DYFS found that the allegation of physical abuse was not substantiated. Notwithstanding the DYFS finding, the Board decided to hire a new aide for J.G. and hired Sharon Lonergran to work with the boy for the remainder of the school year.

During the same school year, J.G. complained to plaintiff that he was being put in the hallway for every test by all of his teachers in violation of his IEP, which provided that Stony Brook would enable J.G. to take eighty percent of his tests on the computer. Ron Fisher, the Board's Director of Technology and Information Services, testified that he purchased a special laptop for J.G.'s exclusive use, but was unable to obtain the software that would permit J.G. to type answers into previously computer-scanned tests. Moreover, J.G.'s teachers adamantly denied that they put the boy in the hallway for his tests, although his math and computer teacher acknowledged having a policy of giving all students makeup tests in the hallway because there were no extra classrooms in the school.

Plaintiff continued to make numerous complaints throughout the school year, claiming that Greco responded with irritation, telling her that the boy should have been "put away" in a cerebral palsy school years ago. Greco denied ever making such a statement.

Appendix A

Plaintiff removed J.G. from school on June 14, 2000, when she filed the due process petition with the DOE. Although the boy missed a total of about eighty school days during the fifth grade, Plewa ensured that his final marks were based upon the work he had completed and permitted him to graduate to the sixth grade.

In her due process petition, plaintiff complained that there was no appropriate sixth grade placement for J.G. The only sixth grade program in North Plainfield for the 1999-2000 term was in the two-story Somerset School, which was more than 100 years old, overcrowded, offered only a single bathroom on each floor and contained just one stairwell-mounted fold-out lift to enable a disabled student to get from the first to the second floor. In her due process petition, plaintiff sought to have the Board "reconfigure the school district" so that the seventh graders could attend the Somerset School while J.G. and his sixth grade classmates could use the more accessible middle school. Greco, the Director of Pupil Services, stated that plaintiff's proposal was not feasible because it would have affected over 600 children. He did, however, offer to pay J.G.'s tuition to an out-of-district school of plaintiff's choice. J.G. applied to one out-of-district school, but was not accepted.

On December 20, 1999, plaintiff toured the Somerset School with Principal Judy Grady. After the tour, plaintiff requested that the lift be replaced with one large enough to accommodate J.G.'s power wheelchair and that the second floor girls' bathroom be redesignated as a boys' bathroom and made handicap accessible.

Appendix A

After plaintiff filed her due process petition in June 2000, the Board's counsel had repeated discussions with plaintiff's counsel regarding J.G.'s sixth grade placement. Plaintiff continued to maintain, through her counsel, that the Somerset School was not an appropriate placement for J.G. because it was physically inaccessible. During the summer of 2000, however, plaintiff was unavailable for discussions to resolve the problems because she took J.G. on a month-long vacation.

A meeting was scheduled for September 18, 2000, the day J.G. was expected to return to school. To prepare for the sixth grade year, Greco hired Constance Fenner to provide twenty hours of home instruction to J.G. Acceding to plaintiff's request, Greco also hired Linda Ciufo, a family friend who was residing with plaintiff and J.G., to serve as J.G.'s in-classroom aide. In the event plaintiff elected to have J.G. attend the Somerset School, Greco also hired Sherry Muenz to serve as an in-class support teacher and renewed Nagy's contract for continued conductive education.

On Friday, September 15, 2000, three days before J.G. was to begin the sixth grade, the Board's counsel and plaintiff's counsel had a conference call with the Administrative Law Judge (ALJ) hearing plaintiff's due process petition. At the direction of the ALJ, the Board's counsel sent a letter to plaintiff's counsel setting forth the available options for the sixth grade year. The letter read as follows:

Appendix A

Pursuant to our discussions, we have tentatively scheduled a continuation of the IEP meeting for Monday, September 18, 2000 at 10:00 a.m. As you are aware, your client's unavailability in Poland has made it difficult to resolve the outstanding issues regarding [J.G.'s] placement for the school year.

. . . .

With respect to school on Monday, the District has determined that Somerset School is not the least restrictive environment for [J.G.] due to the inadequacy and inaccessibility of the facility. The District has arranged for home instruction to be provided for [J.G.] for ten hours per week. The home instructor, Constance Fenner, has [J.G.'s] academic materials in her possession and will be contacting your client on Saturday to make arrangements for the delivery of same and the scheduling of his home instruction. Should [J.G.] wish to participate in extra curricular activities during home instruction, please be advised that the District will provide transportation.

The last agreed-upon IEP provides for placement at the [Stonybrook] School. [J.G.] may attend school at Stonybrook. There is a special education class including fifth and sixth graders which is appropriate for [J.G.]

> pending the resolution of the outstanding issues.
>
> The District has employed Linda Ciufo, pursuant to your client's request, to serve as [J.G.'s] school aide. However, Ms. Ciufo's start date will be resolved . . . [when] the outstanding issues regarding the least restrictive environment for [J.G.] are resolved.
>
> Please contact me today regarding your intentions with respect to [J.G.] accepting home instruction or attending [Stonybrook].

Plaintiff's counsel did not raise any objections to the letter and merely stated that she would be at the meeting on September 18, 2000.

Plaintiff, however, had arranged for a large rally in support of J.G. on the morning of September 18, 2000 in front of the Somerset School. During the rally, plaintiff and J.G. were admitted to the building and plaintiff proceeded to lie down on the floor of the principal's office while shouting obscenities at various Board members who had gathered for the IEP meeting. The police had to be called to disperse the crowd and calm the situation.

No formal IEP was adopted but J.G. began attending the Somerset School for the sixth grade, using a manual wheelchair to fit into the existing lift. A schedule was prepared by which J.G. spent most of his day on the second floor, minimizing his need to use

the lift. Although the boy only had access to the girls' bathroom on the second floor, J.G.'s aides tied a no admittance ribbon to the door to ensure his privacy when he was using the facility.

In October 2000, J.G. complained to plaintiff that he was being stalked and watched by Greco, the Pupil Services Director, and Delaney, the Special Education Supervisor. According to plaintiff, J.G. was so hysterical she had to keep him home from school on October 20, 2000. Greco explained that he observed J.G. on two occasions because Nagy, J.G.'s conductive educator, had not submitted requested reports detailing the boy's current condition in compliance with the requirement that the district re-evaluate all classified students every three years. Greco testified that he simply observed the boy and Ciufo operating the lift on one day and that he returned the next day to sit in on two classes. Delaney observed J.G. on one occasion at Muenz's request but left the room quickly because she saw that the boy was becoming anxious.

In December 2000, J.G. underwent hip surgery requiring a two-month recovery period, during which the Board provided home tutoring services. When the boy returned to the hospital for an additional three-week period in January 2001, the Board provided for in-hospital tutoring.

On February 26, 2001, J.G. returned to school and almost immediately began complaining about Ciufo—the aide plaintiff specified be hired for J.G.—claiming

that she was cold and cruel, yelled at him on several occasions and used obscenities. Ciufo denied the incidents and no one was able to corroborate J.G.'s claims. Thereafter, J.G. attended school only three days a week when Nagy was available and, finally, on April 5, 2001, plaintiff removed J.G. from school and he was home tutored for the remainder of the sixth grade.

In June 2001, plaintiff toured the North Plainfield Middle School in anticipation of J.G.'s seventh and eighth grade years. She was informed that the middle school and high school, which formed one large complex, would be under construction during J.G.'s entire seventh grade year. In order to limit J.G.'s need to use the lift, all of his classes were scheduled on the first floor and a first floor classroom was converted to a science room for him. Although plaintiff admitted that J.G. had good years in the seventh and eighth grades, she nonetheless complained that his computer needs were not met during those years. The evidence indicated, however, that J.G. was re-evaluated as to his technology needs in the Fall of 2001 and the Board purchased a new laptop for him with a special expanded keyboard, a printer and a variety of specialized software. The Board also paid for many hours of computer training for J.G. and for a rental computer when the new laptop crashed.

In the ninth and tenth grades,[1] J.G. often complained that the lift broke. Douglas Boydston, the

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1. We note that J.G. has completed high school and we were advised at oral argument that he is now in college.

contractor used by the Board to repair the lift, testified that there had been problems with the lift, but his company was called promptly by the school and the repairs were made quickly. When the lift broke down in April 2004, it could not be repaired. In July 2004, however, the Board passed an emergency measure allowing for the purchase of a new lift.

J.G. continued to complain about the bathrooms, but the North Plainfield Construction Official and the architect who prepared the plans for renovation of the high school both testified that the bathrooms were ADA and code compliant. Even plaintiff's expert testified that the handicap stalls and bathroom passageways were properly sized.

In this appeal, plaintiff argues:

POINT ONE

JUDGE KUMPF ERRED BY SEVERING THE CASES

POINT TWO

THE COURT ERRED BY REFUSING TO MAKE REASONABLE ACCOMMODATIONS FOR PLAINTIFF FORCING HIM TO HAVE A CHANGE OF VENUE

Appendix A

POINT THREE

THE COURT ERRED BY NOT GRANTING PLAINTIFF'S MOTION IN LIMINE TO DECLARE PLAINTIFF A PREVAILING PARTY WITH REGARD TO THE ACCESS ISSUES

POINT FOUR

JUDGE BUCHSBAUM ERRED BY ALLOWING ANTHONY SCIARILLO TO TESTIFY

POINT FIVE

THE COURT ERRED BY NOT ALLOWING FRANCINE A[.] GARGANO, ESQ. TO TESTIFY

POINT SIX

JUDGE BUCHSBAUM ERRED BY ALLOWING WENDY NG [TO] TESTIFY

POINT SEVEN

THE JUDGE ERRED BY DIRECTLY DISCRIMINATING AGAINST [J.G.]

Appendix A

POINT EIGHT

JUDGE BUCHSBAUM ERRED BY CONSTANTLY INTERRUPTING, INTERJECTING AND OBJECTING TO THE TESTIMONY OF WITNESSES AND MAKING IMPROMPTU COMMENTS TO THE JURY

POINT NINE

THE JUDGE ERRED BY NOT ORDERING A NEW TRIAL

I

Plaintiff first contends that Judge Kumpf committed reversible error in, sua sponte, remanding the administrative portion of the previously consolidated action to the OAL on the eve of trial.

After plaintiff filed an interlocutory appeal from the administrative action in the Law Division, the parties agreed to consolidate the administrative and Law Division actions to engage in mediation.

When mediation was unsuccessful, plaintiff moved to consolidate the two actions in the Law Division for all purposes, including trial. Defendant did not object and the motion was granted on March 2, 2004.

Appendix A

On June 22, 2005, defendants moved before Judge Kumpf for summary judgment with respect to plaintiff's interlocutory appeal in the administrative action. On August 1, 2005, Judge Kumpf denied this motion, but sua sponte remanded the bulk of the administrative action back to the Office of Administrative Law (OAL) based upon his finding that there was no jury question presented given the lack of an administrative determination to review.

Plaintiff argues that there are numerous forums in which to litigate special education cases: the OAL, Superior Court or Federal District Court. In that statement she is correct—but each forum has jurisdiction over certain matters and may be precluded from hearing others. Each administrative agency is vested with authority to adjudicate legal rights and duties of specific parties arising under the rules and regulations promulgated by the agency. *N.J.S.A.* 52:14B-2(b) and (c); *J.E. on Behalf of G.E. v. State Dept. of Human Servs., Div. of Devel. Disabil.*, 131 *N.J.* 552, 622 *A.*2d 227 (1993). Judicial review of administrative actions is vested in the Appellate Division, *R.* 2:2-3(a)(2), and is severely limited. *In re Musick*, 143 *N.J.* 206, 216, 670 *A.*2d 11 (1996) (citing *Gloucester County Welfare Bd. v. N.J. Civil Serv. Comm'n*, 93 *N.J.* 384, 390, 461 *A.*2d 575 (1993)). The judiciary may intervene only in "rare circumstances in which an agency action is clearly inconsistent with its statutory mission or other state policy." *Ibid.* We are bound to "defer to an agency's expertise and superior knowledge of a particular field." *Greenwood v. State Police Training Ctr.*, 127 *N.J.* 500,

513, 606 *A.*2d 336 (1992). Moreover, our scope of review of an agency's action is limited to determining whether there is sufficient credible evidence in the record to support the agency's decision or action. *Clowes v. Terminix Int'l, Inc.*, 109 *N.J.* 575, 588, 538 *A.*2d 794 (1988).

We have carefully considered plaintiff's arguments on this point and we are convinced that they lack sufficient merit to warrant lengthy discussion. *R.* 2:11-3(e)(1)(E). Suffice it to say that the Law Division lacked jurisdiction from the outset to hear an appeal from an administrative agency. *R.* 2:2-3(a)(2); *In re Senior Appeals Examiners*, 60 *N.J.* 356, 363, 290 *A.*2d 129 (1972); *In re Grievance of Trans. Emp.*, 120 *N.J.Super.* 540, 295 *A.*2d 369 (App.Div.1972), *certif. denied*, 62 *N.J.* 193, 299 *A.*2d 727 (1973). Since the Law Division lacked jurisdiction to hear the interlocutory administrative appeal in the first instance and the DOE, through the OAL, was vested with authority to hear plaintiff's due process petition respecting the IEP, the cases should not have been consolidated after the unsuccessful mediation; there was no error in Judge Kumpf's order remanding it. *N.J.S.A.* 52:14B-1 to -24; *see, e.g., Infinity Broadcasting Corp. v. N.J. Meadowlands Com'n*, 187 *N.J.* 212, 223, 901 *A.*2d 312 (2006); *Pascucci v. Vagott*, 71 *N.J.* 40, 53, 362 *A.*2d 566 (1976).

Appendix A

II

Plaintiff next contends that she was denied a fair trial in the Law Division as a result of the change in venue from Somerset to Hunterdon County pursuant to plaintiff's own motion.

On August 18, 2005, shortly before the trial was originally scheduled to begin in Somerset County, plaintiff requested that the case be tried in the new Somerset County Courthouse because J.G.'s wheelchair could not fit into the witness box in the courtroom to which they had been assigned in the old courthouse. Plaintiff insisted that it was "extremely important that [J.G.] testify from the same witness area that other individuals testify from." Plaintiff further requested that a ramp to the witness box be installed in the new courtroom. Plaintiff was advised that the new courthouse did not have wheelchair-accessible witness boxes and that there was no ramp available to be installed. She then moved for a change of venue, arguing that "[a] reasonable accommodation would be to provide plaintiff with a fully accessible courtroom which is located a short distance away in Hunterdon County." Plaintiff's motion was granted and the matter was transferred to a fully ADA-accessible courtroom in Hunterdon County.

Plaintiff argues that her request for accommodations to allow J.G. access to the Somerset County Courthouse and its witness boxes should have been granted because the perceived problems could have been "easily rectified." There is nothing in the

record, however, indicating that plaintiff ever requested that a witness box be placed on the ground level of the courtroom so that everyone could testify from there. Nor, did she present any evidence to support her contention that J.G. would have been prejudiced by testifying from the well of the courtroom rather than the jury box.

Plaintiff next contends that she was prejudiced by the change in venue because: (1) the jurors in Hunterdon County were likely displeased that their tax dollars had to be used to accommodate J.G.; (2) the jurors were possibly influenced as to the merits of the case by the fact that Somerset County had not deemed it necessary to accommodate J.G. with his courtroom requests; (3) the jurors in Hunterdon County likely did not care about possible discrimination by a school district in Somerset County; (4) the Hunterdon County jurors possibly possessed attitudes unique to Hunterdon County as a result of that county's different economic and social makeup; and (5) her attorneys lost valuable preparation time by being forced to drive an additional forty-five minutes each way to trial.

Plaintiff has presented no evidence to support her contentions impugning the impartiality and diligence of the Hunterdon County jurors. Her arguments on those points are speculative and do a disservice to the jurors who gave their time and attention through twenty days of trial. Moreover, plaintiff has identified no deficiency in the performance of her attorneys as a result of the increased travel time. A litigant is entitled to a fair trial,

not a perfect one. *State v. Biddle*, 150 *N.J.Super.* 180, 183, 375 *A.*2d 283 (App.Div.1977). The trial was transferred to Hunterdon County at plaintiff's request. She cannot now complain that the Hunterdon jurors were less sympathetic to her cause or that the travel time was too great a burden. *Regents of the Mercersburg College v. Rep. Franklin Ins. Co.*, 458 *F.*3d 159 (3d Cir.2006); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 *U.S.* 356, 121 *S.Ct.* 955, 148 *L.Ed.*2d 866 (2001).

III

Plaintiff next contends that the trial court committed reversible error in denying her pretrial motion to be declared a prevailing party as to the high school access issues.

Prior to trial, plaintiff moved in limine to be declared a prevailing party under the LAD and the ADA, entitling her to damages and counsel fees. Specifically, she argued that after she filed the lawsuit and presented defendants with an expert report detailing the deficiencies in the high school, defendants complied with their statutory obligations by replacing one lift, ordering another and designating an existing female faculty bathroom as a "unisex" bathroom available to J.G. Relying upon *Warrington v. Village Supermarkets*, 328 *N.J.Super.* 410, 746 *A.*2d 61 (App.Div.2000), plaintiff insists that she had demonstrated the requisite nominal success on her claims.

At a hearing on plaintiff's motion, defendants argued that, contrary to the opinion of plaintiff's expert, the high school was already statutorily compliant prior to the filing of plaintiff's complaint. Defendants demonstrated that the lift was replaced, not because of the expert report, but because it was irreparably broken. They further demonstrated that a handicap-accessible boys' bathroom was always available to J.G. at the high school and the women's faculty bathroom was simply set up as an alternative since J.G. had female aides.

In ruling on plaintiff's motion, the trial court initially observed that it would be premature to declare a prevailing party since defendants continued to maintain that the high school was always statutorily compliant and that the at-issue changes had been made for other legitimate reasons. In the court's view, the position taken by defendants left all issues in the case for the jury to resolve. We agree.

Plaintiff argues that she should have been declared a prevailing party prior to trial because her lawsuit served as the "catalyst" that prompted the changes. Her argument fails in the face of *Buckhannon Bd. & Home Care v. W.Va. Dep't of Health & Human Res.*, 532 *U.S.* 598, 605, 121 *S.Ct.* 1835, 1840, 149 *L.Ed.*2d 855, 863 (2001), in which the United States Supreme Court held that the "catalyst" theory was not a permissible basis for the award of attorney fees under several federal statutes, including the ADA, and that fees could only be awarded under that statute where there was a

judgment on the merits or a settlement agreement enforced through a consent decree. In *Baer v. Klagholz*, 346 *N.J.Super.* 79, 82-83, 786 *A.*2d 907 (App.Div.2001), *certif. denied*, 174 *N.J.* 193, 803 *A.*2d 1165 (2002), we held that *Buckhannon* was binding in New Jersey when the counsel fee provisions of federal statutes were at issue.

IV

Plaintiff contends that the trial court committed plain error in admitting the testimony of Anthony Sciarrillo, the Board's counsel, because he was not on defendants' witness list.

On the sixth day of trial, plaintiff sought to admit into evidence Sciarrillo's September 15, 2000 letter to plaintiff's counsel regarding the arrangements for J.G.'s sixth grade placement. Defendants immediately objected but the trial court tentatively ruled that the letter was admissible as an admission by an authorized representative. In light of that ruling, defendants then requested that Sciarrillo be permitted to testify as to the meaning of the letter. Plaintiff made no objection to this request and the court agreed that, if the letter went in, this would be an appropriate way to deal with the matter.

Sciarrillo testified that he had repeated discussions with plaintiff's counsel regarding J.G.'s sixth grade placement over the summer of 2000. He noted that, although the only place for regular sixth grade classes

was in the Somerset School, plaintiff's counsel maintained that the Somerset School was physically inaccessible for J.G. Although both counsel participated in an IEP meeting on July 19, 2000, during which the Somerset School placement was offered, plaintiff's counsel continued to voice concerns and nothing was resolved. Neither plaintiff's counsel nor plaintiff made themselves available for followup meetings before the beginning of the 2000 school year.

Sciarrillo further testified that on September 15, 2000, he and plaintiff's counsel conferred with the ALJ hearing plaintiff's administrative petition. Sciarrillo advised that, although defendants were offering placement at the Somerset School, an IEP had not been finalized because of plaintiff's concerns. The ALJ directed Sciarrillo to send a letter to plaintiff's counsel setting forth the available options under the circumstances. That same day, Sciarrillo faxed the letter to plaintiff's counsel offering placement in Stony Brook School supplemented by home instruction. The letter expressly noted that the placement was being offered "pending the resolution of the outstanding issues," and included an addendum directed to the ALJ indicating that the letter merely outlined the "current" status of the matter.

"Ordinarily unnamed witnesses should be permitted to testify where the failure to supply their names in discovery was not the result of a design to mislead and where there was no surprise or prejudice to the opposing party if the testimony were to be allowed."

Brown v. Mortimer, 100 *N.J.Super.* 395, 401, 242 *A.*2d 36 (App.Div.1968). We find no error in the trial court's admission of Sciarrillo's testimony. Plaintiff opened the door by offering the September 15, 2000 letter into evidence and cannot now claim that she was prejudiced by Sciarrillo's testimony. *R.* 2:10-2. The trial court properly allowed Sciarrillo's testimony. *Brown, supra*, 100 *N.J.Super.* at 401, 242 *A.*2d 36; *Casino Reinvestment Dev. Auth. v. Lustgarten*, 332 *N.J.Super.* 472, 497, 753 *A.*2d 1190 (App.Div.) *certif. denied*, 165 *N.J.* 607, 762 *A.*2d 221 (2000).

V

Plaintiff contends that the trial court committed reversible error in precluding testimony from one of her attorneys, Francine Gargano.

Prior to trial, defendants objected to Gargano being named as a potential witness. The court noted that, under *R.P.C.* 3.7, Gargano could not appear as counsel *and* be a witness. Plaintiff argued that if Gargano were called, it would only be on rebuttal. The court, however, reiterated that if Gargano participated in the trial, she would be precluded from testifying, unless a "surprise" situation involving "some unusual circumstances" occurred.

Gargano chose to continue as trial counsel and participated extensively in the trial. At the conclusion of defendants' case, plaintiff stated there would be no rebuttal testimony, thereby waiving any claims that

Gargano should have been permitted to testify as a rebuttal witness. Plaintiff has not demonstrated any prejudice resulting from the court's ruling on this issue. *R.* 2:10-2. Consequently, we find no merit in this argument. *R.* 2:11-3(e)(1)(E).

VI

Plaintiff contends that the trial court committed reversible error in admitting the testimony of Wendy Ng, a special education teacher at the high school, because she was not on defendant's witness list.

Early in the trial, J.G. testified on direct as follows:

> [Plaintiff's counsel]: What bathroom did you go use in the fourth grade, the boy's room or the girls' room?
>
> [J.G.]: The girls' room.
>
> [Plaintiff's counsel]: What bathroom did you use in fifth grade?
>
> [J.G.]: The girls' room.
>
> [Plaintiff's counsel]: What bathroom did you use in sixth grade?
>
> [J.G.]: The girls' room.
>
> . . . .

[Plaintiff's counsel]: In seventh grade, [J.G.], did you use the girls' room or the boys' room?

[J.G.]: Thank God I used the boys' room.

[Plaintiff's counsel]: And eighth grade?

[J.G.]: Thank God I used the boys' room . . .

[Plaintiff's counsel]: Ninth and tenth grade?

[J.G.]: Ninth grade I still used the boys' room, tenth grade unfortunately I am back to using the womens' faculty bathroom.

The following day, defendants advised the court that they intended to present Ng's testimony to rebut J.G.'s testimony regarding his tenth-grade bathroom usage. Noting that plaintiff could still depose Ng, the trial court indicated that it was "comfortable" with allowing Ng's testimony over plaintiff's objection. Ng subsequently testified that she observed J.G., as a tenth grader, using the boys' bathroom in the high school cafeteria several times each week.

We have carefully considered the record in light of plaintiff's arguments on this issue and we find no abuse of the trial court's broad discretion in admitting this rebuttal evidence. *Lustgarten, supra,* 332 *N.J.Super.* at 497, 753 *A.*2d 1190. Ng's testimony was limited, not cumulative or repetitive. Plaintiff was able to cross-examine Ng as to her observations and the fact that she learned of J.G.'s testimony from a newspaper article.

Appendix A

VII

Plaintiff contends that she was denied a fair trial because the trial judge discriminated against [J.G.].

Immediately after his opening statement, outside of the presence of the jury, defense counsel made an application that resulted in the following colloquy:

> [Defense counsel]: Regretfully I must bring this motion—or this application. I am going to ask the Judge to direct the plaintiff not to make noises, laugh, giggle, and everything else during my presentation of the case. It was pretty obvious to me that it was being done. And I recognize that [J.G.] has some disabilities and may not be able to control all of his emotions, but if he can't do it, I am going to ask that he be removed from the court because it's distracting to the jury. He'd laugh, the jury would look at him while I was giving my opening. And it's . . . I hate to say disrespectful but it is disrespectful.
>
> THE COURT: I think there are two issues. Number one, was the jury distracted. I know I noticed it but I had a more direct view of [J.G.] maybe than the jury, and was it . . . distracting[,] I doubt it.

> But the second issue is should it go on just as a matter of decorum in the courtroom. And it does appear to me observing the situation that there were a lot more reactions to [defense counsel's] opening than there were to [plaintiff's counsel's]. So I share some of his concern. We all, I think—I have watched both . . . [plaintiff and plaintiff's counsel] attempt to deal with the situation, but really it has to be equal. Whatever [J.G.'s] feelings about the case . . . he can express them no more than any of you could, counsel, or any other witness.
>
> . . . .
>
> I don't see any need from what I have heard at this point to contemplate excluding, it would be a very drastic step. But if he is the good student everyone agrees he is, and he is as perceptive as I am hearing the testimony he is, he should be able to deal with the situation and keep his feelings in check just as . . . any witness or any party would do.
>
> So I am going to direct that that be done.

Plaintiff's counsel represented that J.G.'s reactive behavior was not deliberate but was caused by his cerebral palsy. The court pointed out, however, that J.G. had not been reactive during the initial jury instruction nor during plaintiff's counsel's opening. The court

stated that it had to ensure that the trial was fair to both sides and encouraged plaintiff's counsel to address the matter with J.G. over the lunch break.

Plaintiff now argues that the trial court erred by "going along with" defense counsel's initial application regarding J.G.'s in-court behavior. We find nothing in the record to support that argument.

Later that day, at sidebar, the trial judge asked counsel whether the jury should be told to advise the court if they found J.G. "doing something that distracts them." The judge specifically stated that he did not want the jury "to focus on [J.G.] as being some kind of very different person" but, "[i]f he is the way he is, it is the way he is, we can't change that." Counsel agreed to collaborate on an appropriate instruction, if needed, and the matter was dropped for the moment. Plaintiff stated that she would bring a doctor's note explaining the effects of J.G.'s cerebral palsy on his behavior. The note was never provided, however.

The next day, while plaintiff was on the witness stand, defense counsel objected to plaintiff's hearsay testimony and the court called counsel to sidebar. While counsel and the court were involved at sidebar, J.G. began crying and left the courtroom. Plaintiff's counsel noted during sidebar that the jury had witnessed his behavior and requested that something be said. After some discussion, plaintiff's counsel agreed that an instruction was not necessary at that point. Nevertheless, the trial judge told counsel that he would

take direction from them as to when to intervene and what to say. Counsel agreed. The judge stated, "[s]omehow or other we are going to have a fair trial here with respect to this young man."

The trial proceeded thereafter, largely without incident. During his testimony, J.G. explained that he has more difficulty controlling his body if he is upset or nervous, resulting in unexpected movements. Later, the trial court interrupted the testimony of Board member Mary Elizabeth O'Connor regarding accessibility of the bathrooms and addressed the jury as follows:

> Let's just hold for a minute here. Let's-all right. I will just note for the record that there was apparently an incident of discomfort on the part of the Plaintiff, [J.G.]. Of course, the jury is not to draw any inference one way or another as to why that might have occurred, or any inference about the case from that situation.

There is no indication in the record as to what triggered the court's comment. Notably, plaintiff's counsel did not object to this instruction. Plaintiff now argues, however, that the trial judge committed reversible error by pointing out J.G.'s behavior, which plaintiff alleges the court did solely to frighten and humiliate J.G.

Plaintiff further insists that the trial judge improperly made "constant" comments to the jury about J.G.'s discomfort, thereby discriminating against him.

Appendix A

We have carefully reviewed the extensive trial record and we find nothing to support that claim. Rather, the record reflects only the one instance noted above when the court made a sua sponte comment to the jury and plaintiff's counsel failed to object. When the court raised the question of J.G.'s discomfort at sidebar, the court's obvious goal was to solicit counsels' thoughts on the best way to handle any developing situation. Nothing in the record leads us to conclude that the trial court discriminated against J.G.

VIII

Plaintiff further contends that she was denied a fair trial as a result of improper judicial interference. A judge must "conduct [a] trial in a fair and impartial manner, without making remarks that might prejudice a party or which are calculated to influence the minds of the jury." *Cestero v. Ferrara*, 110 *N.J.Super.* 264, 273, 265 *A.*2d 387 (App.Div.1970), *aff'd*, 57 *N.J.* 497, 273 *A.*2d 761 (1971). A judge should never unfairly criticize or humiliate counsel, especially in front of the jury. *Mercer v. Weyerhaeuser Co., supra*, 324 *N.J.Super.* at 298, 735 *A.*2d 576. A judge's failure to abide by these guidelines "can easily prejudice a jury since it conveys the opinion of the judge as to his [or her] belief or disbelief in one side of the case." *State v. Zwillman*, 112 *N.J.Super.* 6, 21, 270 *A.*2d 284 (App.Div.1970), *certif. denied*, 57 *N.J.* 603, 274 *A.*2d 56 (1971). Nevertheless, a trial court has wide discretion in controlling the courtroom and the court proceedings. *Ryslik v. Krass*, 279 *N.J.Super.* 293, 297, 652 *A.*2d 767 (App.Div.1995). Alleged misconduct

by a trial judge must be reviewed within the context of the entire record in order to determine whether it had prejudicial impact. *Mercer v. Weyerhaeuser Co.*, 324 *N.J.Super.* 290, 298, 735 *A.*2d 576 (App.Div.1999)

We have carefully reviewed the extensive record of this lengthy trial, along with the pre- and post-trial proceedings, and we find no evidence to support plaintiff's numerous claims of prejudicial conduct by the trial court. Indeed, we are impressed with Judge Peter Buchsbaum's efforts to ensure that both parties had a level playing field and a fair trial. Judge Buchsbaum exercised great patience during this lengthy, difficult and sensitive trial. He conducted the proceedings well within the bounds of judicial conduct.

IX

Finally, plaintiff argues that the trial court erred in denying her motion for a new trial based on the weight of the evidence. *Rule* 4:49-1(a) provides that a trial court must grant a motion for a new trial "if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly appears that there was a miscarriage of justice under the law." *Dolson v. Anastasia*, 55 *N.J.* 2, 7, 258 *A.*2d 706 (1969). We must adhere to essentially the same standard when reviewing a trial court's action on a motion for a new trial. We must give deference to the trial court's feel of the case as to matters such as the demeanor and credibility of witnesses, but otherwise we conduct an independent review of the record to determine the fairness of the

result. *Carrino v. Novotny*, 78 *N.J.* 355, 360-61, 396 *A.*2d 561 (1979); *Baxter v. Fairmont Food Co.*, 74 *N.J.* 588, 597-98, 379 *A.*2d 225 (1977). "An appellate court may overturn a jury verdict 'only if [that] verdict is so far contrary to the weight of the evidence as to give rise to the inescapable conclusion of mistake, passion, prejudice or partiality.' " *Kassick v. Milwaukee Elec. Tool Corp.*, 120 *N.J.* 130, 134, 576 *A.*2d 270 (1990) (quoting *Wytupeck v. City of Camden*, 25 *N.J.* 450, 466, 136 *A.*2d 887 (1957)); *accord JMB Enterprises v. Atl. Employers Ins. Co.*, 228 *N.J.Super.* 610, 616, 550 *A.*2d 764 (App.Div.1988).

In her new trial motion, plaintiff argued that the jury's verdict was plainly erroneous since Sciarrillo's September 15, 2000 letter was an admission by defendants that the Somerset School was not ADA compliant. She further claimed that the record was clear that no effort had been made at Somerset School to accommodate J.G.'s bathroom needs or his power wheelchair and that J.G. was blatantly discriminated against when he was deemed an impediment in the hallways.

In its decision denying plaintiff's motion, the trial court initially observed that each "fact" plaintiff continued to allege as indicative of discrimination, was subjected to a great deal of "cross testimony [and] countervailing facts." The court observed that the jury's assessment of the credibility of plaintiff and J.G. might have been affected by their testimony. The court noted that there was "a great difference in the way [plaintiff and J.G.] responded to questions in direct

[testimony], with a great deal of animation," contrasted with the "frequent 'I don't knows' or 'I don't remembers' on cross." The court noted that J.G.'s testimony that he didn't remember certain things could have led the jury to conclude "that some of the incidents were not as severe as he might have posed them." The court further noted that plaintiff's credibility was also likely affected by her claim that she had no idea there was going to be a demonstration on September 18, 2000, which was wholly belied by her extraordinary behavior on that date.

Moreover, the court was not persuaded that Sciarrillo's letter of September 15, 2000 was conclusive proof of discrimination. The court noted initially that the letter "was a serious piece of evidence in favor of the plaintiff. . . . Viewed in isolation, [it] basically says: Stay out of our school." When viewed in the context of what was happening at the time, however, the letter had a different import and "[t]he jury was entitled to believe that there was some kind of miscommunication or some kind of direction that was involved in that letter going out at the time it did with respect to . . . what counsel thought his obligations were to the administrative law judge." The court concluded that taken in context, the September 15 letter was not conclusive proof of discrimination. We agree.

Our review of the twenty-day trial record has convinced us that the verdict was more than adequately supported by the evidence and there was no miscarriage of justice. *R.* 4:49-1(a); *Dolson, supra,* 55 *N.J.* at 6, 258 *A.*2d 706.

Affirmed.

APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, SOMERSET COUNTY, LAW DIVISION DATED JUNE 22, 2005

STATEMENT OF REASONS

SUPERIOR COURT OF NEW JERSEY
SOMERSET COUNTY
LAW DIVISION
HONORABLE FRED H. KUMPF, J.S.C.
RETURN DATE: July 22, 2005
DOCKET NO.: SOM-L-990-01
(consolidated with SOM-L-860-01)

GARGANO V. NORTH PLAINFIELD BOARD OF EDUCATION, et. al.

DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

MOVANT: DEFENDANT NORTH PLAINFIELD BOARD OF EDUCATION, et. al. ATTORNEY: JOHN H. SCHMIDT, ESQ.

OPPONENT: PLAINTIFF DENISE GARGANO, GUARDIAN AD LITEM FOR A.J.G. A MINOR ATTORNEY: RICHARD FLAUM, ESQ. and FRANCINE GARGANO, ESQ.

ORAL ARGUMENT: YES

Appendix B

COURT'S OPINION

Defendant filed this motion on June 22, 2005 seeking summary judgment on the interlocutory appeal of rulings on motions by the administrative law judge in the due process petition filed with the New Jersey Department of Education alleging violations of the Individuals with Disabilities Education Act, (IDEA), 20 *U.S.C.A.* §1415(1)(l)(E), in docket number SOM-L-860-01. Plaintiff filed opposition on July 14, 2005. There is a trial date scheduled in this case for August 15, 2005.

This action is on behalf of A.J.G. a classified student who attends North Plainfield High School. A.J.G. is confined to a wheelchair as a result of a physical handicap suffered at birth. On or about June 15, 2000, Plaintiffs filed a due process petition with the New Jersey Department of Education alleging violations of the IDEA relative to the special education and related services provided to A.J.G. by Defendant. The filing of that petition resulted in an administrative law proceeding being initiated before the Office of Administrative Law. The allegations in the administrative action related to plaintiff's attendance in fifth grade in the Stony Brook school during the 1999 to 2000 academic school year and with the qualifications of the staff working with A.J.G. and the quality of the assistive technology provided to A.J.G. in violation of the Individual Education Program (I.E.P.) for A.J.G. and provisions of related services and accommodations by the teaching staff. The administrative action also sought placement for the 2000 academic school year with plaintiff seeking, according

to Defendant, to "reconfigure the school district by moving elementary school and middle school." Prior to the hearing a number of motions were made by Plaintiff to exclude the testimony of the school psychologist on the basis of that the information was privileged under *N.J.R.E.* 505 and to exclude witnesses for defendant from the hearing, which motions were denied by the Administrative Law Judge hearing the matter. Plaintiff moved for interlocutory appeal of the denial of these motions and for a stay of the administrative hearing to the Superior Court Law Division. By order dated June 7, 2001, the Honorable Helen Hoens, P.J.S.C. granted leave to appeal and issued a stay of the administrative action pending the appeal. The order also set up a status conference and Judge Hoens decided that the interlocutory appeal of the administrative action under docket number SOM-L-860-01 should be heard with the complaint for violation of the Laws Against Discrimination (LAD), which was to be filed.

On June 28, 2001, Plaintiff filed an action in the Superior Court under docket number SOM-L-990-01. In the complaint, Plaintiffs alleged violations of the ADA, Section 504 of the Rehabilitation Act, 29 *U.S.C.A.* §701, et seq. and the New Jersey Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1, et seq. Plaintiffs seek to have the Somerset School, the North Plainfield Board of Education (NPBOE) Middle School and the NPBOE High School made Americans with Disabilities Act (ADA) and New Jersey Handicap Access Law (NJHAL) compliant. On March 2, 2004, an order was entered by the Honorable Frank W. Gasiorowski, J.S.C.,

consolidating the complaint with docket number SOM-L-860-01 with the complaint with docket number SOM-L-990-01 for all purposes including discovery and trial.

DEFENDANT CONTENDS

Defendant contends that Plaintiff should be barred from pursuing claims filed in the administrative action because he failed to exhaust his administrative remedies. Defendant contends that the IDEA requires an aggrieved party to invoke a state's administrative procedure prior to instituting a claim in state or federal court. Defendant contends that Plaintiff is also ban-red from circumventing the IDEA's exhaustion by taking claims that could have been brought under the IDEA and repackaging them as claims under some other statute. Defendant contends that in this case Plaintiff filed a due process petition alleging that the District did not provide him with a free, appropriate public education under the IDEA. Defendant contends that Plaintiff did not pursue this administrative process to its conclusion. Defendant contends that Plaintiff is then barred from pursuing these claims in this Court as he failed to exhaust his administrative remedies.

Defendant contends that Plaintiff's claims relating to Stony Brook School, Somerset School, and the Middle School must be dismissed as moot. Defendant contends that Plaintiff has not attended school in these buildings for years and will not attend them again. Defendant contends that Plaintiff graduated from Stony Brook School in June 2000 and there is no case or controversy

regarding Stony Brook School and the services provided there. Defendant contends further that Plaintiff ceased attending Somerset School four years ago and the Middle School two years ago and that Plaintiff will never be in the position to require the services, or utilize the facilities, of Somerset School or the Middle School.

PLAINTIFF'S OPPOSITION

Plaintiff first contends that they should not be barred from pursuing claims filed in the administrative action as the administrative action was stayed pending this action in the Superior Court and because Plaintiff did not fail to exhaust his administrative remedies. Plaintiff contends that the Defendants consented to these matters being consolidated and cannot argue now that consolidation was improper. Plaintiff contends that Defendants are precluded from now arguing that this matter is barred because Plaintiff failed to exhaust his administrative remedies. Plaintiff contends that they did not ignore the OAL and file in Superior Court. Plaintiff contends that the court, all litigants and all of their attorneys saw fit to consolidate these cases in the Superior Court.

Plaintiff next contends that the claims against Stony Brook School, Somerset School and the Middle School are not moot. Plaintiff contends that the mere fact that the Plaintiff no longer attends these schools does not mean that the schools noncompliance with the ADA and the NJHAL are moot. Plaintiff contends further that it does not mean Plaintiff has not suffered damages while attending those schools.

Appendix B

DISCUSSION

Defendant moves for summary judgment on the issue that the Plaintiff's should be barred from pursuing claims filed in the administrative action because he failed to exhaust his administrative remedies. Defendant contends that the IDEA requires an aggrieved party to invoke a state's administrative procedure prior to instituting a claim in state or federal court. 20 *U.S.CA.* §1415(e)(2). Section 1415(f) of the IDEA provides that before bringing claims under other statutes that "seek relief that is also available under this subchapter," the administrative procedures set forth in §1415 "shall be exhausted to the same extent as would be required had the action been brought under this subchapter." 20 *U.S.C.A.* §1415(f).

A.J.G. is a child with disabilities as defined in the Individuals with Disabilities Education Act. 20 *U.S.C* . § 1401(a)(1)(A). The State of New Jersey does receive financial assistance from the United States Federal Government which is made available through IDEA. *20 U.S.C* § 1400-1415. Consequently, the defendant is subject to the provisions of the IDEA and is required to provide a free appropriate public education as defined in 20 *U.S.C.* § 1401(a)(18) to all children with disabilities. The stated purpose of the IDEA is to assure that all handicap children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to ensure the rights of handicap children and their parents or guardians are protected,

to assist states and localities to provide education of all handicap children and to assess and assure the effectiveness of efforts to educate handicap children. 20 *U.S.C.* § 1400(c); *Whitehead v. School Board for Hillsborough County, Florida*, 918 *F. Supp.* 515, 517-518 (M.D. Fla. 1996). Under the IDEA, any state or local agency receiving assistance must establish and maintain "procedural safeguards" for implementing the IDEA. 20 *U.S.C.* § 1415(a). These procedures include not only the right of the parents to participate in the development of the "Individual Education Program" (IEP), but also the requirement that parents be given an opportunity to contest any matter that relates to the provision of a "free appropriate education" for their child. 20 *U.S.C.* § 1415(b). If the parents of a handicapped child decide to bring a complaint they must be given "an impartial due process hearing." 20 U.S.C. § 1415(b). On completion of the administrative process, "any party aggrieved by the findings and decisions . . . shall have the right to bring a civil action with respect to the complaint" in either state or Federal court which shall, "receive the records of the administrative proceedings . . . and basing its decision on the preponderance of the evidence shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). In *Anderson v. Thompson*, 658 *F.2nd* 1205, 1208-11 (7th Circuit 1981) the court indicated that under the IDEA the phrase "all appropriate relief' allowed the courts to "adopt the program offered by the school district or the program advocated by the parents, or that it could . . . devise any program which in its view would ensure an appropriate individualized educational program". In *Anderson*,

supra, 658 *F.2nd* at 1211-12 the court made it clear, however, that the language does not permit the filing of an educational malpractice action and that damages are not generally available as a remedy under the IDEA. *Anderson, supra*, 658 *F.2nd* at 1208-1211; *see Minor v. Missouri*, 673 *F.2nd* 969, 979 (8th Circuit 1982) (holding that "appropriate relief" was "generally intended to be restricted to injunctive relief, within which the judge would have wide latitude to fashion an individualized education program for the child." Damages were permitted only under exceptional circumstances, (1) where the school district's placement of the child would endanger the child's physical health, and (2) where the school district "acted in bad faith by failing to comply with the procedural provisions of IDEA in an egregious fashion" *Anderson, supra*, 658 *F.2nd* at 1213-1214; *see also Whitehead v. School Board of Hillsborough County, State of Florida, supra*, 918 *F. Supp.* at 516-519. Hence, as stated by the District Court in *Whitehead* "the explicit purpose of IDEA is to assure the establishment of appropriate public educational opportunities for handicap children, and not to serve as a source from which individuals may collect tort-type damages. The proper remedy for violation of IDEA is to implement an appropriate educational plan for the child and compensate parents for providing services that the child should have that the school should have provided. 20 *U.S.C.* Section 1400(c); Whitehead Supra 918 Fed. Sup at 1520. The relief required under the IDEA requires that there be administrative determinations for the court to review. There is support for defendant's argument that failing to have

administrative determination which the court can review would warrant the granting of partial summary judgment and dismissing so much of that complaint as alleges a failure to comply with the IDEA. See Whitehead v. School Board of Hillsborough County, State of Florida, 932 *F. Supp* 1393, 1396 (M.D. Fla. 1996).

The IDEA does appear to require an aggrieved party to exhaust his administrative remedies, as a prerequisite to the courts review of the administrative law judge findings and the determination by the Commissioner of Education of the IEP for the child. The facts in this case do not suggest that this is a situation where a plaintiff has attempted to abandon his administrative claim by filing in the Superior Court. The procedural history in this case shows that the administrative action was stayed pending the resolution of the matter in the Superior Court. The Defendant at no time during the four year history of the case prior to this motion, sought to lift that stay and proceed with the administrative determination. In fact, the procedural history shows that in this case Plaintiff sought administrative action initially. The appeal of the initial rulings on motions by the OAL and the action in the Superior Court were eventually consolidated in an order dated March 2, 2004 for all purposes including discovery and trial and not just for administrative purposes as the Defendant suggests. The Defendant waited until the eve of trial scheduled for August 16, 2005 to file this motion for partial summary judgment. This is not a case where the Plaintiff has abandoned his administrative claims and failed to exhaust his remedies; but rather a case where for the parties and for the courts convenience, both actions were consolidated in the Superior Court.

Appendix B

One wonders given the nature of the relief contemplated under the IDEA, what jury question is presented for trial or for determination by the court given the lack of administrative determination to review. The fee shifting provisions under the IDEA, §615(i)(3)(B), 20 U.S.C.A. §1415(i)(3)(B), is not a sufficient basis for the court to circumvent the purpose behind the IDEA to develop an I.E.P. for this child. The only remedy under the IDEA is to develop the appropriate I.E.P. and the courts role under the IDEA is to review the administrative determination. Though the Defendant seeks partial summary judgment with respect to the IDEA interlocutory appeal, there is no basis for the Defendant to win on that issue. The proper remedy would be to remand this matter to the OAL to reach a final determination through the exhaustion of the administrative remedy with the court retaining jurisdiction to review the matter upon final administrative determination. *See Waterman by Waterman v. Markett-Intermediate School District* 539 *F. Supp.* 361, 366-367 (W. D. Mich. 1999). Therefore, the Defendant's motion for partial summary judgment on the IDEA claim in docket number SOM-L-860-01 on the basis that they failed to exhaust their administrative remedies is **DENIED** and the matter is remanded to the OAL for a determination of the appropriate IEP for Plaintiff A.J.G. The court will schedule argument on the appeal of the OAL judge's ruling on the motions. The court retains jurisdiction in this matter until the interlocutory appeal is briefed, argued and decided.

Appendix B

Defendant moves for summary judgment on Plaintiff's claims relating to his attendance at Stony Brook School, Somerset School, and the Middle School. Defendant contends that the claims are moot because he no longer attends those schools. It is well established that "controversies which have become moot or academic prior to judicial resolution ordinarily will be dismissed." *Cinque v. New Jersey Dept. of Corrections*, 261 *N.J.Super.* 242 (App. Div. 1993); *citing Oxfeld v. New Jersey Bd. of Educ.*, 68 *N.J.* 301, 303-04 (1975). In this case the claims asserted by Plaintiff are neither moot nor academic. The issue of whether the Stony Brook School, Somerset School, and Middle School were ADA and NJHAL compliant during Plaintiff's attendance is still very much' in controversy, despite the fact that he no longer attends those schools, and this issue must be tried before a jury. Furthermore, even assuming arguendo that these claims were moot, the issues involve "great public important compelling resolution." *Oxfeld, supra at* 303. Also, Plaintiff alleges that he suffered damages while at Stony Brook, Somerset, and the Middle School stemming from their alleged non-compliance. Certainly, the damages alleged to have been suffered are not moot despite the fact that he no longer attends those schools. To determine whether Plaintiff is entitled to damages it must first be determined whether those three schools were in compliance. Thus, Defendant's motion to dismiss Plaintiff's claims regarding the Stony Brook School, Somerset School, and Middle School is **DENIED**.

APPENDIX C — ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING PETITION FOR CERTIFICATION FILED JULY 15, 2008

SUPREME COURT OF NEW JERSEY
C-1175 September Term 2007
62,649

D.G., GUARDIAN AD LITEM FOR J.G., A MINOR,

Plaintiff-Petitioner,

v.

NORTH PLAINFIELD BOARD OF EDUCATION, et al.,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3988-05 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 11th day of July, 2008.

s/ Stephen Townsend
Stephen Townsend
CLERK OF THE SUPREME COURT

APPENDIX D — TRANSCRIPT OF PROCEEDINGS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CIVIL PART, SOMERSET COUNTY DATED MARCH 17, 2006

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CIVIL PART
SOMERSET COUNTY
DOCKET NO. L-990-01
A.D. #A-3988-05T5

DENISE GARGANO, GUARDIAN AD LITEM FOR JG, A MINOR,

Plaintiff,

-VS-

NORTH PLAINFIELD BOARD OF EDUCATION, RICHARD GRECO, DIRECTOR OF PUPIL SERVICES, JANE DELANEY, SUPERVISOR SPECIAL EDUCATION, and MARILYN BIRNBAUM, SUPERINTENDENT,

Defendants.

STENOGRAPHIC TRANSCRIPT
OF MOTION FOR NEW TRIAL

PLACE: Hunterdon County Justice Center
65 Park Avenue
Flemington, New Jersey 08822

DATE: March 17, 2006

Appendix D

BEFORE:

THE HONORABLE PETER A. BUCHSBAUM, J.S.C

* * *

[32] THE COURT: Miss Gargano?

All right. This is a motion for new trial pursuant to Rule 4:49-1. The basic standard is that the Court has to be convinced that the verdict is so contrary to the evidence that there was a miscarriage of justice.

The Court's aware of the intense nature of this case, that it involves a seven-year period, it involves the life of a young man who despite cerebral palsy has done in some ways remarkably well, in other ways suffers, as anyone would, from — from not having all the full mobility that other people might have.

The Court's confronted with a jury verdict based on detailed questions in which there was six liability questions. Just so we remember where we were, let's just remember what they were.

Has plaintiff proven that the North Plainfield Board of Ed deprived plaintiff of rights under Title Two of the ADA, which is the Division of Services. No, seven nothing.

Did the North Plainfield Board of Ed fail to provide the plaintiff with reasonable accommodations for his

handicap in violation of the NJLAD? Again no, seven nothing.

Did the North Plainfield Board of Ed [33] intentionally discriminate based on handicap? Same.

Did the North Plainfield Board of Ed create a hostile environment for the plaintiff in fifth or sixth grades or both due to his handicap? Again no.

Did the Board of Ed retaliate in sixth grade for exercising his right to seek accommodations?

Both of these two related in some respect to the letter we have discussed. Again no.

And then specifically a question: Do you find that there was intentional or reckless indifference to constitution — to federal constitutional rights due to equal protection of the law with respect to that letter? Again no.

This was not a matter that was submitted to the jury without a great deal of discussion and instruction and — and detail. In fact, everything in this case over seven weeks, 18 trial days was, as Mr. Schmidt said, and as the Court has observed, hotly contested. The adequacy of the bathrooms, whether there was any complaints about them, particularly in the upper grades and through the IEP process or any other process.

Appendix D

There were debates about the provision in the adaptive education and its timeliness, the provision with some reluctance by the town of the [34] conductive therapy with respect to OT and PT, and whether that was an accommodation.

The hiring of aides was another contested matter.

There was dispute over the extent to which Mr. Beckford was qualified. There is no dispute that he was brought in initially because the plaintiffs wanted a male aid.

There was some dispute over the qualifications and abilities of Miss Ciufo. Quite frankly, plaintiff's testimony that she didn't recommend Miss Ciufo under the circumstances the jury could certainly find not credible because Miss Ciufo was living with her.

At the end then the final aide is Rose Gargano, whose plaintiff's — infant Plaintiff's grandmother.

There is also testimony with respect to the conductive educator, Miss Nagy, if I have that name from my recollection correct as to how she pronounced her name, and her lack of complaints even though she was the one who saw Josh most frequently.

There are also debates with respect to the bathrooms, as to whether — what extent these items really effected the plaintiff. A couple of the items [35] that the expert talked about in upper grades were lack of tampon dispensers, which obviously had had no impact on this particular individual.

The issue with respect to a key, there was no — the Court remembers no specific testimony one way or another as to young Mr. Gargano not having a key. So if there was a violation, again what — the debate was did it actually effect him.

There was testimony about the approval of — the local approval of the lift, and whether it did or didn't get approved, and there was disputed testimony about the — about the timing. The Court can question why it took apparently six weeks to initially respond to the reports of the broken lift, but there was also testimony that when the — when the Board did respond, it held an emergency session and grant and did an emergency resolution for procurement in mid-summer, and the jury could have taken that into account.

There was testimony that the stall sizes were not out of compliance. And as I think Mr. Simons pointed out, the testimony about the weight of the chair was not — in the Court's recollection of the evidence was not conclusive in terms of whether that current lift is still even improper.

So too with respect to the testimony [36] concerning the physical facilities, there was a great deal of debate.

With respect to the testimony concerning the aides, there was a great deal of debate.

Just going further on to — on to the up chuck incident. Yes, there was testimony from Mr. Gargano

that he was — this was poured on his head, and from Mrs. Gargano that she observed this chemical on his head. There was also testimony from Mr. Beckford that he didn't do that, and testimony from other officials that whatever might have been done, it did not involve pouring anything on his head, it was just all part of an effort to clean up the chair, and did not involve any danger or injury to Mr. — young Mr. Gargano.

There was also a lack of complaint by Ms. Nagy or the grandmother before Joshua Gargano got home that day, which means that the actual importance of this incident and what exactly it shows about the character of the school and its response is not a matter without its gradations of truth. The jury could have made one finding or another on that. It certainly would not have — I would be talking, making the same comment if the jury had found that was evidence of discrimination. But they did not. And they were [37] entitled to view the various pieces of evidence on that particular incident as they did.

The Court can without — I mean, there are also occasionally — I remember there were issues of credibility in this case, who are you going to believe. And the Court will state for the record that the response of both Joshua Gargano and Mrs. Gargano on cross tended to be monosyllabic. There was in the Court's view a great difference in the way they responded to questions in direct, with a great deal of animation, and frequent "I don't knows" or "I don't remembers" on cross. Particularly I remember when Josh Gargano

didn't remember his ninth or tenth grade grades, and the young man as smart as he is, the jury could of found that — that some of the incidents were not as severe as he might have posed them. As brilliant as he was, and wonderful and dynamic as he was in parts of his testimony, the jury was not obliged to believe every piece of it. And the same thing with Mrs. Gargano.

This issue about the weight of the chair, as I said again, was in conflict.

There was also a great deal of testimony about the summer camp which the town apparently provided after some urging. It is hard to say that the [38] evidence with respect to anything dealing with summer camp clearly required the jury to find discrimination.

All right. We next come to the meaning of that 9-15 letter which was explored in a couple of the questions. That was a serious piece of evidence in favor of the plaintiff. No doubt about it. Viewed in isolation, basically says: Stay out of our school. But that's not what happened that day. There was in fact a meeting going on, there was in fact an aide there, Miss Ciufo as I recall, ready to — to deal with the plaintiff. And in fact the plaintiff Mr. Gargano was allowed in later in the day and began — began a course of instruction that day.

The jury was entitled to believe that there was some kind of miscommunication or some kind of direction that was involved in that letter going out at the time it did with respect to the — with respect to what counsel

thought his obligations were to the administrative law judge. The question isn't whether I believe that, the question is could the jury believe that. And there is enough evidence both ways with respect to that particular letter and what actually happened on September eighteenth of that year, 2001, that could — which would enable a jury to find that that letter itself was not clear evidence of [39] discrimination either intentionally, or in effect that it was just an unfortunate piece of correspondence which was not necessarily reflective of what the District intended to do, and was in fact doing on the eighteenth.

The Court was also, in addition, entitled to consider the circumstances of the demonstration. Mrs. Gargano testified that she had nothing to do with it being a demonstration. Clearly there was other testimony that that was an entirely organized affair. And how the jury might have reacted to the credibility of those two different versions of the demonstration's origin and how it bore on the September fifteenth letter and its effect, versus how the plaintiff — the defendants' view of what was going on that day is again a question about which this court can only speculate but obviously had to leave to the jury to determine.

There were also — there was also — one of the documents submitted talked about the — there was also in the record the certification that Richard Greco prepared and Jane Delaney. These are Exhibits B and C to Mr. Flaum's papers. Excuse me, A, B — and B. The fact that the Board sought legal instruction with

respect to getting additional evaluations does not itself necessarily prove discrimination to the point [40] where the jury had to find — again even — even by itself or in combination with everything else that this was significant evidence that added significant weight to the discrimination. I am not trying to imply that each piece of evidence has to stand on its own, that each piece of evidence needs to prove discrimination, obviously that is not the case, the jury was entitled to look at the cumulative total of the evidence. But in this particular situation the jury could find that simply requesting an administrative law judge to do something is not significant evidence of discrimination, doesn't add to the calculus one way or the other.

Again, the issue is not what this court would have found were this case tried without a jury, but what the Court could have found.

Similarly, with respect to the policy, which is Exhibit D, to be sure it doesn't mention reasonable accommodation, but there was also testimony about training on reasonable accommodation. And again, you have a conflict, do we look at the policy only or do we look at all the evidence. Do we look at the evidence of — of Joshua going to Hawthorne and other places for physical education, do we look at the computers over time he got. If we are looking at [41] all — the entire picture, we have a very mixed picture.

The Court struggled with this motion, obviously struggled with the trial. I won't project what the Court's

vote as a juror would have been. But that's again not the issue.

Every one of the items mentioned by Mr. Flaum, Ms. Gargano — and I respect the passion and the intelligence you brought to this case, but every one of those issues was the subject of a great deal of — of cross testimony, countervailing facts.

And the final thing I want to mention is for better, for worse, this case was tried involving — because of the clarity part of it going to the Office of Administrative Law and sitting there, this case was tried with respect to events that occurred over a seven-year period. The jury had an enormous amount to consider. Had this discrimination been limited to one or two items, I can't speculate now as to what might have happened, but the jury was being asked to make findings in general as to an entire pattern of discrimination and a claimed reasonable accommodation with respect to a whole group of grades. That it found overall there was no discrimination, that the plaintiff had not to their, the jury members' satisfaction, [42] proved their case.

It is not a verdict under these circumstances that the Court views as so clearly infected by passion, by misunderstanding, of the evidence by mistake that the Court can in good conscience order a new trial in this matter.

So with all due respect, which is a phrase I hate to hear from counsel, and I am sorry I just rendered it to you both, the motion is going to be denied.

I have the order. We will simply stamp it denied.

I will provide you with a copy of the order momentarily if you would like to wait.

And the Court is in recess.

This order says January, I notice. It's been that long.

Okay. Counsel, I think you could wait in the courtroom because the next item is in chambers, so there is no reason that you need to move. We will just have copies of the order made.

MR. FLAUM: Thank you, your Honor.

MS. FRANCINE GARGANO: Thank you, your Honor.

MS. CORNELL: Thank you, Judge.

[43] (At which time the matter was concluded.)

APPENDIX E — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUNTERDON COUNTY, CIVIL DIVISION FILED DECEMBER 20, 2005

Order of Disposition Filed: December 20, 2005

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
HUNTERDON COUNTY CIVIL DIVISION
65 PARK AVENUE, FLEMINGTON, NJ 08822
(908) 237-5820, TDD (908) 788-1255

CIVIL ACTION
ORDER OF DISPOSITION
DOCKET NO. SOM-L-990-01

Gargano

PLAINTIFF(S)

v.

North Plainfield Board of Education, et als.

DEFENDANT(S)

It is on this 19 day of December 2005, **ORDERED** that this matter is hereby disposed due to the following:

☑ 05 Tried to completition w/Jury

Appendix E

It is further ORDERED that the plaintiff shall serve a copy of this ORDER on the defendant within ten (10) days of the above date.

COMMENTS: Verdict for defendant

s/ Peter A. Buchsbaum
PETER A. BUCHSBAUM, J.S.C.

No. 08-502

Supreme Court, U.S.
FILED
NOV 14 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

D.G., GUARDIAN AD LITEM FOR J.G., A MINOR,

Petitioner,

v.

NORTH PLAINFIELD BOARD OF EDUCATION, RICHARD GRECO, JANE DELANEY and MARILYN BIRNBAUM,

Respondents.

On Petition For A Writ Of Certiorari To The New Jersey Superior Court Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN H. SCHMIDT, JR.
LINDABURY, MCCORMICK, ESTABROOK & COOPER
53 Cardinal Drive
Westfield, New Jersey 07091
(908) 301-5607

Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PROCEDURAL HISTORY AS PERTINENT TO PETITION 1

FACTS ESTABLISHED BY TRIAL TESTIMONY AND NECESSARY TO UNDERSTAND THE ISSUES PRESENTED IN THE PENDING PETITION 5

REASONS FOR DENYING THE PETITION 18

I. Review Should Be Denied As The Petition Was Filed Beyond The Time Provided By Sup. Ct. R. 13(1) 18

II. This Petition Should Be Denied Since Petitioner Has Failed To Join Necessary And Indispensible Parties, The State Of New Jersey And The Superior Court Of New Jersey 20

III. Review Should Be Denied Because Petitioner Cannot Factually And Legally Substantiate His Complaints That He Was Treated Unjustly By The New Jersey Courts 22

A. Judge Kumpf Did Not Err By Severing The Case 22

B. Because Petitioner Voluntarily Sought A Change In Venue, He Should Be Judicially Estopped For Claiming That He Was Denied Access To The Courts In Somerset County Because Of His Disability 25

TABLE OF CONTENTS – Continued

Page

C. The Trial Court's Demeanor And Control Of His Courtroom Was Appropriate And Fair 26

IV. The Law Regarding *Prima Facie* Evidence Of A Violation Of The ADA Is Clear. The Trial Court Correctly Applied That Law Denied Petitioner's Motion *In Limine* To Be Declared A Prevailing Party With Regard To Handicap Access Issues Under The ADA. Review Of This Issue Is Unwarranted And Unnecessary 28

CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES

Angst v. Royal Maccabees Life Insurance Company, 77 F.3d 701 (3d Cir. 1996).....21

Bechtel v. E. Penn Sch. Dist. of Lehigh County, CIV. A. 93-4898, 1994 WL 3396 (E.D. Pa. Jan. 4, 1994) 29

Block ex rel. Block v. Rockford Pub. Sch. Dist. # 205, 01 C 50133, 2001 WL 1195757 (N.D. Ill. Oct. 10, 2001).....29

Board of Education v. Rowley, 458 U.S. 176 (1982).....23

Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524 (3d Cir. 2007), *amended on reh'g* (Mar. 8, 2007) 29

Brett v. Great American Recreation, 144 N.J. 479 (1996).....26

DeBord v. Bd. of Educ. of Ferguson-Florissant Sch. Dist., 126 F.3d 1102 (8th Cir. 1997).....29

Matthews v. Jefferson, 29 F. Supp. 2d 525 (W.D. Ark. 1998).....31

McCurrie v. Town of Kearny, 174 N.J. 523 (2002).....25

Montrose Medical Group Participating Savings Plan v. Bulger, 243 F.3d 773 (3d Cir. 2001) 25, 26

New Jersey DFYS v. J.Y., 352 N.J. Super. 245 (Sup. Ct. App. Div. 2002).....26

TABLE OF AUTHORITIES – Continued

Page

Parker v. Universidad De Puerto Rico, 225 F.3d 1 (1st Cir. 2000) 31

Pittsburgh Towing Company v. Mississippi Valley Barge Line Company, 385 U.S. 32 (1966) 18, 19

Polera v. Bd. of Educ. Of the Newburgh Enlarged City School District, 288 F.3d 478 (2d Cir. 2002) 24

Ramer v. NJ Transit Bus Operations, 335 N.J. Super. 304 (Sup. Ct. App. Div. 2000) 25

S.H. v. State-Operated School District of the City of Newark, 336 F.3d 260 (D.N.J. 2003) 23

Schonfeld v. City of Arlsbab, 978 F. Supp. 1329 (S.D. Cal. 1997) 31

State v. Davenport, 177 N.J. 288 (2003) 27

Swenson v. Lincoln Respondents No. 2, 260 F. Supp. 2d 1136 (D. Wyo. 2003) 29

Vallejo By Morales v. Rahway Police Dept., 292 N.J. Super. 333 (Sup. Ct. App. Div. 1996) 26

Vargas v. Camilo, 354 N.J. Super. 420 (Sup. Ct. App. Div. 2002), *certif. den.* 175 N.J. 543 (2003) 25

STATUTES

20 U.S.C. § 1415(b)(6) 24

20 U.S.C. § 1415(f) 24

42 U.S.C. § 1400 ..... 2, 3

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 12101-12213 20

42 U.S.C. § 12131 29

42 U.S.C. § 12131(1) 29

42 U.S.C. § 12132 29

RULES

Fed. R. Civ. P. 19 .....20, 21

Fed. R. Civ. P. 19(b) 21

Sup. Ct. R. 13(1) 18

REGULATIONS

28 C.F.R. § 35.150 30

28 C.F.R. § 35.150(b)(1) 30

28 C.F.R. § 35.151 30

28 C.F.R. § 35.151(a) 31

28 C.F.R. § 35.151(b) 31

28 C.F.R. § 35.151(c) 32

28 C.F.R. Part 35 32

28 C.F.R. Part 36 32

28 C.F.R. Part 36, App. A 32

41 C.F.R. § 10 32

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

4 Moore's Federal Practice, § 19.03(2)(b)(ii) 21

21 A.L.R. Fed. 12 (1974) 21

NTS Am. Jur. 2d, *Americans with Disabilities Act: Analysis and Implications* § 284 30

PROCEDURAL HISTORY AS PERTINENT TO PETITION

On or about June 15, 2000, Petitioner's mother filed a due process petition with the New Jersey Department of Education, Office of Special Education Programs on behalf of Petitioner against the North Plainfield Board of Education and several individual defendants (hereinafter "Respondents") alleging, *inter alia*, that the Respondents violated Petitioner's Individualized Education Plan ("IEP") during the 1999-2000 school year. Although the Respondents attempted to convene several IEP meetings with Petitioner and his mother to address these issues, their efforts were fruitless.

The matter was assigned to the Honorable Kathryn A. Clark, A.L.J.[1]

On or about April 24, 2001, the parties appeared before Judge Clark to address prehearing motions, discovery and witnesses. At that time, counsel for Petitioner objected to Petitioner's guidance counselor testifying at the due process hearing, and to two of Respondents' representatives being present in the courtroom during the due process hearing. Judge Clark denied both applications.

On May 24, 2001, the parties appeared before Judge Clark to present opening arguments in the due

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[1] Hon. Kathryn A. Clark, A.L.J., was a New Jersey Administrative Law Judge.

process hearing. At that time, counsel for Petitioner moved for reconsideration of Judge Clark's denial of his objections. Judge Clark denied Petitioner's motion for reconsideration.

On or about June 6, 2001, the parties were scheduled to appear before Judge Clark to commence the due process hearings. Petitioner failed to appear. Alternatively, Petitioner sought *ex parte* review of Judge Clark's ruling and a stay pending appeal on an emergent basis from the Appellate Division of the Superior Court. The Appellate Division refused to hear the matter, because it did not possess initial appellate jurisdiction over actions arising pursuant to the Individuals with Disabilities Education Act ("IDEA"), 42 U.S.C. § 1400. Appellate jurisdiction rested with the United States District Court. Because of Petitioner's failure to appear before Judge Clark as scheduled, the due process hearing did not proceed.

On June 7, 2001, Judge Clark issued a written ruling reflecting, *inter alia*, the denial of Petitioner's motions. On June 7, 2001, Petitioner sought *ex parte* review of Judge Clark's ruling and a stay pending appeal before the Honorable Helen E. Hoens, P.J.Cv.[2] (at that time). Justice Hoens stayed the Administrative Law matter pending appeal.

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[2] At the time of the Plaintiff's *ex parte* application, the Honorable Helen E. Hoens was the Presiding Judge of the Civil Part of the Superior Court of New Jersey in Somerset County. The Honorable Helen E. Hoens is presently a Justice of the New Jersey Supreme Court.

On or about June 8, 2001, the parties appeared before Justice Hoens to discuss case management of the appeal. On or about June 22, 2001, the parties also participated in a telephone conference with Justice Hoens regarding the status of the appeal and a briefing schedule.

On or about July 3, 2001, Petitioner filed a Complaint in the Superior Court of New Jersey alleging that the Respondents discriminated against him on the basis of his disability in violation of the New Jersey Law Against Discrimination, the Americans with Disabilities Act, federal equal protection laws and Petitioner's rights under the Individuals with Disabilities Education Act ("IDEA"), 42 U.S.C. § 1400. That matter was initially assigned to the Honorable Frank W. Gasiorowski, J.S.C.[3] As such, the parties agreed to consolidate the administrative and Superior Court matters for purposes of mediation only. Then the parties attempted to mediate the matters to no avail.

The matter was subsequently re-assigned from Judge Gasiorowski to the Honorable Fred H. Kumpf, J.S.C. Thereafter, on or about August 1, 2005, the Judge Kumpf, J.S.C., remanded Petitioner's due process petition to the Office of Administrative Law because, pursuant to the IDEA, Petitioner is required

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[3] J.S.C. is an abbreviation for Judge of the Superior Court of New Jersey.

to exhaust administrative remedies prior to judicial review.

Shortly before trial, Petitioner moved to change venue from Somerset County to Hunterdon County[4] so that Petitioner could testify while sitting in his wheelchair in the witness box. Somerset County was apparently unable to remove a step into the witness box or construct a ramp for Petitioner's wheelchair to use to get into the witness box. Although Judge Kumpf had suggested that Petitioner testify from sitting in his wheelchair directly in front of the witness box as had occurred in other matters with witnesses confined to a wheelchair, Petitioner objected; Petitioner argued that by testifying in front of the witness box the jury would perceive Petitioner as "different." Since Hunterdon County was able to rearrange the witness box in courtroom so that Petitioner could maneuver his wheelchair into the witness box, Petitioner voluntarily sought a change of venue. Petitioner's motion was granted.

From November 1, 2005 through December 16, 2005 an 18-day jury trial was conducted before the Honorable Peter A. Buchsbaum, J.S.C.[5] On or about December 19, 2005, the jury entered a verdict in favor

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[4] Hunterdon County is contiguous to Somerset County. The two Courthouses are located approximately 15 miles from each other.

[5] Petitioner incorrectly stated that Judge Kumpf, presided over the trial of this matter.

of the Respondents and against Petitioner on all counts of the Complaint. On or about December 21, 2005, Judge Buchsbaum entered an Order of Judgment with prejudice and memorializing the jury verdict. Thereafter, on or about March 17, 2006, Judge Buchsbaum denied Petitioner's motion for a new trial and/or to set aside the verdict.

Petitioner subsequently appealed the trial court verdict. The Appellate Division of the Superior Court of New Jersey affirmed the trial court verdict. On July 11, 2008, the Chief Justice of the New Jersey Supreme Court entered an Order denying Petitioner's Petition for Certification to that Court.

FACTS ESTABLISHED BY TRIAL TESTIMONY AND NECESSARY TO UNDERSTAND THE ISSUES PRESENTED IN THE PENDING PETITION[6]

Amongst the many allegations made during the trial, Petitioner complained that Ricardo Beckford, an aide assigned to assist him, was not trained by the Respondents as per agreement between the parties. As a result of this, Petitioner complained that he was often left in urine and feces in class and chemicals were poured over him when he vomited. In fact, Mr.

[6] Facts set forth herein were discerned strictly from trial testimony. Citations to trial transcript can be submitted to substantiate each fact depicted.

Beckford was an experienced aide. He had worked for five years as an instructional aide for the Respondents. Mr. Beckford also had experience working with children with cerebral palsy. Although Mr. Beckford had discussions with Richard Greco[7] about additional training to work as Petitioner's aide, Mr. Beckford was unable to accomplish that training during the summer months. Nonetheless, Mr. Greco advised Erika Nagy, Petitioner's conductive educator, that the Respondents would pay her for training Mr. Beckford at the commencement of the school year. Ms. Nagy was advised to take as much time as was necessary to train Mr. Beckford. Except for the testimony of Petitioner, there was no other testimony substantiating the fact that Petitioner was "left in urine and feces in class." His teachers never saw puddles of urine under his chair. Although Mr. Beckford acknowledged that on occasion Petitioner did wet himself, Mr. Beckford explained when and how it would occur. Mr. Beckford denied ever allowing Petitioner to wet himself such that puddles formed under his chair. Although Ms. Nagy claimed to have found Petitioner wet, she acknowledged that she never complained to the case manager about that condition. Ms. Nagy acknowledged that Mr. Beckford walked Petitioner between classes.

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[7] Richard Greco was the Director of Pupil Services for the North Plainfield School District.

Petitioner claimed that he was not receiving the materials he needed, that he was not receiving adaptive physical education, that he was not provided with "make-up time" for his conductive educator, that he was not allowed to use his power wheelchair in the school, and that he was not allowed to be in the hallway with his friends. He also claimed that he was abused by the aides. Except for the statement of an at-home tutor assigned to assist the Petitioner in the fifth and sixth grades that she "seemed to get a lot of resistance," there was no testimony substantiating any of Petitioner's remaining allegations. In the sixth grade Petitioner had a regular classroom teacher, a special education teacher assigned to work only with him during the school day, an aide, a conductive educator and an at-home tutor assigned by the Respondents to assist him with his education.

The Respondents set up a computer for the Petitioner with a special computer keyboard in the library at the elementary school when he was in preschool. When Petitioner entered the third grade, a computer was set up in his classroom with a special intellikeys keyboard for his use. During the fourth grade, Petitioner was evaluated by the Center for Enabling Technology for specific computer equipment and programs. As a result thereof, the Respondents purchased a laptop computer for Petitioner during his fifth grade school year pursuant to the recommendations made by the Center for Enabling Technology. As Petitioner entered the sixth grade, additional software was installed onto his laptop computer. Petitioner's

sixth grade in-class, special education support teacher was also trained to assist him in the use of his computer. In the seventh grade, a second laptop computer was purchased by the Respondents for Petitioner. In addition to being provided with in-school computer classes, Petitioner was also provided with private computer lessons, during regular school hours, through the Bergen County Special Services School District. The cost of those private computer lessons was paid for by the Respondents. In the ninth grade, the Respondents purchased a third laptop computer for the Petitioner. Computer technicians employed by the Respondents were routinely available to install new software onto Petitioner's computer as needed, and to repair and reboot the computer when it crashed. The computers provided to Petitioner were regularly upgraded with new equipment, as it became available. It should be noted that Petitioner is the only North Plainfield student who has been provided with a laptop computer by the Respondents. The Respondents also arranged and paid for Petitioner to attend a summer computer camp.

Petitioner was not able to use his power wheelchair when he attended sixth grade in Somerset School. The chair was too large to fit on the chair lift that had previously been installed in that school building. Nonetheless, Petitioner's mother had no objection to the Respondents purchasing an appropriate manual wheelchair for his use within that school.

Contrary to the allegations of the Petitioner, there was absolutely no evidence that the Principal or Respondents did not want Petitioner using his wheelchair in the hallways in the Somerset School. To the contrary, Judy Grady, the Principal of the Somerset School, testified that in her 42 years of education, she has never barred any child from her school.

Petitioner alleged that charges of abuse were made against his aides. No such charges were ever filed with the Respondents. Petitioner did claim that Mr. Beckford abused him by using a product named "Upchuk" in an attempt to clean vomit off of him and his wheelchair. That incident occurred during the fall of Petitioner's fifth grade school year. Petitioner testified that Upchuk was poured over him by Mr. Beckford. Seven months later in June 2000, a complaint was filed with the New Jersey Division of Youth and Family Services (hereinafter "DYFS") regarding the use of Upchuk, amongst other things. James Gregory was an investigator with the Institutional Abuse Investigation Unit of DYFS. He investigated the complaint filed on behalf of Petitioner and issued a report finding that Mr. Beckford's actions were justified and appropriate and that any allegations of abuse were unfounded.

Books on tape, together with a special tape player, were ordered for Petitioner and paid for by the Respondents. Petitioner received adaptive physical education at his mother's request. In addition to adaptive physical education, Petitioner utilized the services of a conductive educator, Erika Nagy; the

Respondents paid for that service. The Respondents also paid for Petitioner to attend a summer camp program run by Erika Nagy and for transportation to and from that camp. The Respondents further paid for Erika Nagy to provide "make up" services for those services missed during the school year. In addition, the Respondents provided for Petitioner to have adaptive physical education and physical therapy with third party agencies at its cost and expense.

The Respondents acknowledged that the physical structure of Somerset School was not fully, handicap accessible. It was an old building that had not been fully renovated. It had a lift and the girl's bathroom was made handicap accessible. Notwithstanding its physical shortcomings, the services provided were fully accessible to handicap and disabled students such as Petitioner. There were no complaints made by Petitioner or by his mother that he did not have appropriate access to the school to take full advantage of the education services being offered.

Petitioner attended the North Plainfield Middle/ High School since entering the seventh grade. In the Spring prior to Petitioner's entering the seventh grade, Petitioner's mother toured the middle school building with Robert Abbate, the Vice Principal of the North Plainfield Middle School. Petitioner's mother testified at trial that as a result of the tour, she determined the handicap stall in the boys' bathroom was too small for Petitioner's wheelchair, and she asked that it be enlarged. Mr. Abbate, however, contradicted the testimony of Petitioner's mother.

According to Mr. Abbate, it was agreed that the first floor bathroom was adequately sized for Petitioner's needs; the second floor bathroom was inadequately sized. As a result, all of Petitioner's classes during the seventh and eighth grade were held on the first floor of the middle school building. Moreover, Petitioner's mother executed an IEP concerning the Petitioner and his advancement into the seventh grade on May 22, 2001. Under the provisions of the document pertaining to the parent's concerns, there was no mention of "bathroom accessibility issues." Similarly, there was no mention of "bathroom accessibility issues" raised in the IEP concerning Petitioner and his advancement into the eighth grade. At no time during Petitioner's seventh or eighth grade school years did anyone complain to either Mr. Abbate, Vice Principal of the Middle School, or to Rita Linder-Lavery, the case manager assigned by the Respondents to work with Petitioner, about inaccessible bathrooms.

Petitioner and his mother also toured the North Plainfield High School before he began the ninth grade. The tour was conducted with Rita Linder-Lavery. Petitioner's class schedule was prepared in anticipation of that tour and given to Petitioner's mother. Following that tour, the following state ment was placed on a copy of Petitioner's class schedule, "Schedule and classrooms approved, the cafeteria, bathroom facilities, acceptable, accommodations will have to be made on the lift used for access to computer room." Petitioner's mother and

Ms. Linder-Lavery initialed that statement. Thereafter, Petitioner's mother never raised any issues to Ms. Linder-Lavery concerning bathroom inaccessibility. The IEP prepared in anticipation of Petitioner entering tenth grade did not include any parental comments about inaccessible bathrooms.

Edmund H. Gaunt, Jr., an architect, testified as an expert witness on behalf of Petitioner with respect to whether the North Plainfield High School physical plant met the Americans with Disability Act construction standards. As a result of his physical inspection of the High School building Mr. Gaunt concluded that the boys' bathroom off of the cafeteria had minor noncompliance issues. The press down faucet did not allow water to flow for 10 seconds before shutting off. The paper towel dispenser was six inches too high. The sink was two inches too high. The toilet paper dispenser was five inches too high. The urinal was one inch too high.

Mr. Gaunt also inspected three other boys' bathrooms in the High School. With respect to an upper level bathroom, he determined that the urinals were not spaced properly for wheelchair access, that the toilet seat was two inches too low, and that the mirror was fourteen inches too high. With respect to the boys' bathroom at the top of the first set of stairs, Mr. Gaunt determined that the floor mounted urinals were not sanitary, that the faucet was not operating, that the toilet paper dispenser was five inches too high, that the toilet seat was one and one-half inch too low, and that the toilet door was improperly

placed in front of the toilet. And with respect to the boys' bathroom in building B, Mr. Gaunt determined that the toilet paper dispenser was seventeen inches too high, that the toilet seat was one and one-half inch too low, that the paper towel dispenser was twelve inches too high, that the sink was one inch too low and that the handicapped sink failed to have insulation underneath it.

Mr. Gaunt inspected the two lifts that were routinely used by Petitioner. In so doing, Mr. Gaunt determined that the base on the inclined lift was only thirty inches wide; the ADA construction standards required a thirty-six inch base. He also found that it was key activated; the ADA construction standards required a system that could be used by anyone at any time, such as a button system. Mr. Gaunt determined that the vertical lift was ADA compliant except for the fact that it was key activated.

Mr. Gaunt also inspected other access ways around the High School. As a result, he determined that classroom doors were recessed and had no latch side clearance. He also found that the doorknobs were not ADA compliant.

Notwithstanding those findings, Mr. Gaunt acknowledged that when dealing with a public building, Title Two of the ADA specifically provides that not every aspect of the public building must be accessible or compliant with ADA construction requirements, provided that individuals with disabilities have access to the services provided within the public

building. He also acknowledged that when a public school is renovated, construction plans must be approved by the New Jersey Department of Community Affairs or a local building inspector. In such case, the plans are reviewed for compliance with the Barrier Free Access Code and not the ADA.

Mr. Gaunt also agreed that if construction plans are approved, construction is completed and if construction is approved by the local construction official, a school board has a reasonable basis for believing that the construction was done in compliance with the Barrier Free Access Code.

Mr. Gaunt acknowledged that the boys' bathroom off of the cafeteria had only minor infractions, and that his deceased partner, who had done the initial inspection and expert's report for the Petitioner regarding the High School building, said that the bathroom was ADA compliant. Mr. Gaunt also said that he did nothing to determine if the minor infractions in that boys' bathroom interfered with or restricted Petitioner's use of that bathroom.

Although the inclined lift platform was slightly smaller than ADA requirements, Mr. Gaunt understood that Petitioner regularly used the inclined lift. He also understood that Petitioner used the vertical lift. He acknowledged that Petitioner or his aide had a key to operate both lifts. Mr. Gaunt further acknowledged that his deceased partner did not think it was realistic to place a lift into a school that anyone could use by pressing a button. Finally, Mr. Gaunt

acknowledged that he did not know whether the deviations from ADA construction standards that he discussed interfered with or prevented Petitioner from having full access to the school services offered at North Plainfield High School.

At the time of the trial, Petitioner was in the eleventh grade and in all honors classes – U.S. History, Precalculus Honors, English II Honors, Advanced Biology Seven Honors, Web Page Design and Spanish Four Honors.

North Plainfield Middle/High School had undergone certain renovations several years prior to trial. The construction plans for the renovations were prepared by licensed architects. The construction plans were prepared so that all renovations were done in compliance with the New Jersey Barrier Free Access Code. Said plans were reviewed and approved by the North Plainfield Construction Official. Construction of the renovations at the Middle/High School was done in accordance with the construction plans. A certificate of occupancy was issued by the North Plainfield Construction Official following the completion of construction. The renovations to the North Plainfield Middle/High School were completed in accordance with the New Jersey Barrier Free Access Code.

Petitioner claimed that the lifts that he used in the Somerset School and the Middle/High School were continually out of order. Trial testimony demonstrated, however, that the lifts used by the Petitioner

were infrequently inoperable or that they became inoperable because of user error. The Respondents' custodial staff was not responsible for repairing the lifts. Rather, the Respondents contracted for these services with Handi Lift, an elevator contractor. That elevator contractor was contacted immediately when a lift became inoperable. Generally, Handi Lift responded within one day for a service call.

Handi Lift maintained service records for all repairs made to all of the lifts it serviced for the Respondents, including the lifts at the Somerset School and the Middle/High School. Those records were introduced into evidence at trial and indicated that Handi Lift made service calls to the Somerset School on September 19, 2000 (the day after Petitioner first attended Somerset School). During the next three weeks, there were several problems that arose and were appropriately addressed. Repairs to the lift were completed on October 10, 2000. No further repairs were made to the lift at Somerset School during the 2000-2001 school year – the only year that the Petitioner attended the Somerset School.

The records maintained by Handi Lift indicated that the vertical lift was repaired in August 2003 (the summer before the Petitioner entered the ninth grade and before he began using the vertical lift). Thereafter, Handi Lift was not called to service that vertical lift until April 28, 2004. At that time, the mechanic servicing the lift recommended a new lift. The parts needed to repair the vertical lift were no longer available. Notwithstanding the need to be replaced,

the vertical lift continued to operate until June 16, 2004. The Respondents contracted with Handi Lift for the installation of a new lift on July 30, 2004. Installation was fully completed and a certificate of occupancy was issued for the new vertical lift on October 20, 2004. During the balance of the 2004-2005 school year, Handi Lift serviced the vertical lift on December 14, 2004 (upper gate was pulling from the wall); January 6, 2005 (lower door was out of adjustment – caused by pulling, pushing or running into the door); February 11, 2005 (lower door was out of adjustment); March 11, 2005 (lower door was out of adjustment); March 24, 2005 (adjust the gate switch on the upper gate); April 14, 2005 (lower door was out of adjustment); and September 19, 2005 (lower door was out of adjustment).

The records maintained by Handi Lift indicated that the inclined lift was repaired on January 16, 2004 (wiring was pulled out of the upper call box of the lift), on May 27, 2004 (repaired a broken upper limit arm) and on September 17, 2004 (replaced the driver box key that was vandalized).

Although there were short periods of time when either the inclined lift or the vertical lift was not operating, it is clear that the lifts were not routinely out of service. Moreover, the Respondents acted promptly and appropriately to repair and replace the lifts as necessary. Finally, it should also be noted that the majority of the repairs were necessitated by

someone hitting or running into the door of the vertical lift and causing it to become out of line.

REASONS FOR DENYING THE PETITION

I.

REVIEW SHOULD BE DENIED AS THE PETITION WAS FILED BEYOND THE TIME PROVIDED BY SUP. CT. R. 13(1)

The Petition for Certification filed with the New Jersey Supreme Court was denied by Order of the Honorable Stuart Rabner, Chief Justice, dated July 11, 2008. That Order was filed by the Clerk of that Court on July 15, 2008. The Petition for a Writ of Certiorari was with the Clerk of the United States Supreme Court on October 14, 2008.

Sup. Ct. R. 13(1) provides:

> A petition for writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

In *Pittsburgh Towing Company v. Mississippi Valley Barge Line Company*, 385 U.S. 32 (1966), this Court addressed the fate of an appeal that was untimely docketed. The Petitioner argued that the late docketing was the result of a miscommunication

between counsel. *Id.* This Court dismissed the appeal and, in doing so, announced:

> [I]f there are to be rules, there must be some limit to our willingness to overlook their violation. While we are inclined to be generous in exercising our discretion to forgive a mistake and waive the consequences of negligence, fairness to other counsel and to parties with business before the Court as well as due regard for our own procedures leads us to believe that this case does not warrant our indulgence.

Id. at 32-33.

Ninety (90) days from July 11, 2008, the date of the entry of the Order by the Chief Justice of the New Jersey Supreme Court, was October 9, 2008. The filing of this Petition on October 14, 2008 was clearly untimely. Even if the ninety (90) day time period were to run from the filing rather than the entry of the Order of the New Jersey Supreme Court, the time period for filing the Petition with this Court would have expired on October 13, 2008.

Since the Petition in this matter was untimely filed, the Petition should be denied. *Pittsburg Towing Company v. Mississippi Valley Barge Line Company*, *supra*.

II.

THIS PETITION SHOULD BE DENIED SINCE PETITIONER HAS FAILED TO JOIN NECESSARY AND INDISPENSABLE PARTIES, THE STATE OF NEW JERSEY AND THE SUPERIOR COURT OF NEW JERSEY

Point II of the Petition filed on behalf of Petitioner seeks to settle issues concerning the application of Title II of the Americans With Disabilities Act, 42 U.S.C. §§ 12101-12213, to the Courts comprising the Superior Court of New Jersey. More particularly Petitioner petitions this Court to accept this matter and to render an opinion concerning the obligations of Superior Court of New Jersey to individuals suffering from disabilities.

Point III of the Petition filed on behalf of Petitioner seeks to settle issues concerning the treatment afforded Petitioner by the trial judge, a judge of the Superior Court of New Jersey. In that regard, Petitioner asks this Court to issue directives regarding the manner in which a judge of the Superior Court of New Jersey is to handle a trial regarding an individual with a disability.

Fed. R. Civ. P. 19 provides:

> (a) **Persons Required to Be Joined if Feasible.**
>
> (1) ***Required Party.*** A person who is subject to Service of process and whose joinder will not deprive the

> court of subject matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties . . .

Fed. R. Civ. P. 19 requires the joinder of a party if the nonjoinder of that party will preclude the court from effecting the relief sought between the extant parties. It requires joinder of a party if the nonjoinder will preclude the court from rendering complete justice among the parties already joined in the action. *Angst v. Royal Maccabees Life Insurance Company*, 77 F.3d 701 (3d Cir. 1996); 4 Moore's Federal Practice, § 19.03(2)(b)(ii); *"Validity, construction, and application of Rule, Rule 19(b) of Federal Rules of Civil Procedure, as amended in 1966, providing for determination to be made by court to proceed with or dismiss action when joinder of person needed for just adjudication is not feasible,"* 21 A.L.R. Fed. 12 (1974).

In the present matter, Petitioner is asking this Court to render a decision affecting the manner in which the Superior Court of New Jersey furnishes its courthouses and/or makes its Court facilities accessible to individuals with disabilities. Unfortunately, neither the State of New Jersey nor the Superior Court of New Jersey are parties to this action. As such, this Court is precluded from rendering "complete justice." Since neither the State of New Jersey nor the Superior Court of New Jersey is a party to this action, no decision rendered by this Court will have any effect upon the Courts about which Petitioner

complains. Since the failure of Petitioner to join the State of New Jersey or the Superior Court of New Jersey will bar this Court from rendering "complete justice", this Petition filed on behalf of Petitioner should be denied.

III.

REVIEW SHOULD BE DENIED BECAUSE PETITIONER CANNOT FACTUALLY AND LEGALLY SUBSTANTIATE HIS COMPLAINTS THAT HE WAS TREATED UNJUSTLY BY THE NEW JERSEY COURTS

Petitioner has raised a myriad of issues regarding alleged errors committed by the trial court and claims that such errors justify a new trial. As stated in more detail hereinafter, however, there is no factual or legal justification for any of Petitioner's arguments. Moreover, there were no objections made by Petitioner's counsel to most of the alleged errors, and the alleged errors do not, either individually or on the whole, constitute "plain error."

A. JUDGE KUMPF DID NOT ERR BY SEVERING THE CASE

On or about August 1, 2005, Judge Kumpf remanded Petitioner's due process petition to the Office of Administrative Law because, pursuant to the IDEA, Petitioner was required to exhaust administrative remedies prior to judicial review. Petitioner's allegation that Judge Kumpf *sua sponte* severed the

Office of Administrative Law and Superior Court matters is simply incorrect. The Respondents had moved for partial summary judgment seeking dismissal of Petitioner's case for failure to exhaust his administrative remedies. Specifically, the Respondents argued that the IDEA required an adjudication of the issues at the administrative level and that the Court's standard of review of those issues was dependent upon an administrative record. The Court was required to give the administrative findings "due weight." *Board of Education v. Rowley*, 458 U.S. 176, 205-206 (1982). Respondents argued that a court is advised not to substitute its own notions of educational policy for those of the local school authorities. *S.H. v. State-Operated School District of the City of Newark*, 336 F.3d 260, 270 (D.N.J. 2003). When a due process petition was filed on behalf of Petitioner alleging that the Respondents did not provide him with a free, appropriate public education, Petitioner was required to pursue this administrative process to its conclusion.

Although Judge Kumpf denied the Respondents' motion to dismiss, he concurred with the Respondents' legal arguments regarding exhaustion and remanded Petitioner's due process petition to the Office of Administrative Law. Pursuant to the IDEA, Petitioner was required to exhaust all administrative remedies prior to judicial review. Judge Kumpf remanded the matter to the Office of Administrative Law to reach a final determination on the merits concerning all of the IDEA issues.

Moreover, consolidation of the administrative matter with the Superior Court litigation would *not* have been proper under the circumstances of this matter, as Petitioner was required to exhaust his administrative remedies. § 1415(f) of the IDEA provides that before bringing claims under other statutes that "seek relief that is also available under this subchapter," the administrative procedures set forth in § 1415 "shall be exhausted to the same extent as would be required had the action been brought under this subchapter." 20 U.S.C. § 1415(f). This exhaustion requirement was intended to "channel disputes related to the education of disabled children into an administrative process that could apply administrators' expertise in the area and promptly resolve grievances." *Polera v. Bd. of Educ. Of the Newburgh Enlarged City School District,* 288 F.3d 478 (2d Cir. 2002). The scope of the IDEA due process proceeding encompasses all "complaints with respect to any matter relating to the identification, evaluation or educational placement of a child, or the provision of a free appropriate public education." 20 U.S.C. § 1415(b)(6).

B. BECAUSE PETITIONER VOLUNTARILY SOUGHT A CHANGE IN VENUE, HE SHOULD BE JUDICIALLY ESTOPPED FOR CLAIMING THAT HE WAS DENIED ACCESS TO THE COURTS IN SOMERSET COUNTY BECAUSE OF HIS DISABILITY

Petitioner argues that the Superior Court of New Jersey erred by refusing to make reasonable accommodations for him, thereby forcing him to file a motion to change venue from Somerset County to Hunterdon County. This Court must understand, however, that Petitioner voluntarily moved for a change of venue. On October 13, 2005, Judge Kumpf entered an order granting Petitioner's request for relief. Subsequently, Petitioner failed to object to the trial of this matter proceeding in Hunterdon County. Accordingly, Petitioner, who accepted the benefit of the trial court's ruling, should now be judicially estopped from attacking this ruling on appeal.

Judicial estoppel is the preclusion of a party from taking a litigation position inconsistent with a position purposely taken in the same or previous litigation on which that party prevailed. *See generally*: *Montrose Medical Group Participating Savings Plan v. Bulger*, 243 F.3d 773 (3d Cir. 2001); *McCurrie v. Town of Kearny*, 174 N.J. 523, 533-34 (2002); *Vargas v. Camilo*, 354 N.J. Super. 420, 429-30 (Sup. Ct. App. Div. 2002), *certif. den.*, 175 N.J. 543 (2003). In order for the doctrine to apply, it is necessary that the prior contrary position need not only have been asserted but also decided in the prior proceeding. *See*: *Ramer*

v. NJ Transit Bus Operations, 335 N.J. Super. 304 (Sup. Ct. App. Div. 2000). This Court should not review a claim of error if the party asserting error on appeal "urged the court to adopt the proposition now alleged to be error." *Montrose Medical Group Participating Savings Plan, supra. Brett v. Great American Recreation,* 144 N.J. 479 (1996). *See also*: *Vallejo By Morales v. Rahway Police Dept.,* 292 N.J. Super. 333, 340-41 (Sup. Ct. App. Div. 1996), *certif. den.*, 147 N.J. 262 (1996).

As stated, Petitioner requested a change in venue; he obtained a Court Order transferring venue to the County of his choice; he then conducted a trial in Hunterdon County without objection to the location. As such, Petitioner should now be judicially estopped from attacking the Superior Court's decision to grant that request. Petitioner's acceptance of the benefit of that ruling is inconsistent with a claim that the ruling was erroneous.

C. THE TRIAL COURT'S DEMEANOR AND CONTROL OF HIS COURTROOM WAS APPROPRIATE AND FAIR

The trial court in New Jersey is given broad discretion to exercise reasonable control over the courtroom and the manner and method of presenting evidence to ascertain the truth. *New Jersey DFYS v. J.Y.*, 352 N.J. Super. 245 (Sup. Ct. App. Div. 2002). That control extends to the parties' location and

movement within the courtroom. *State v. Davenport*, 177 N.J. 288 (2003).

Although Petitioner makes scurrilous allegations about the conduct of the trial judge, Petitioner failed to point to any portion of the trial transcript in either the briefs submitted to the Appellate Division of the Superior Court of New Jersey or to the New Jersey Supreme Court that depicted inappropriate judicial conduct. Petitioner has also failed to cite any legal authority to support his bald allegations. A review of the trial transcript, however, will clearly illustrate how the trial judge carefully and with great concern for Petitioner addressed issues regarding the Petitioner's courtroom decorum. It should also be noted that Petitioner's counsel never objected to the trial judge's statements or directions concerning Petitioner's courtroom demeanor. In short, the trial judge made every effort to treat the parties in an equal and courteous manner. There simply was no prejudice to Petitioner.

Similarly, Petitioner makes allegations that he was treated unfairly by the attorney representing the Respondents. Again, however, Petitioner is estopped from pointing to any portion of the trial transcript that depicts such unfair conduct. And once again, it must be noted that Petitioner's counsel failed to object even one time to the allegedly outrageous and unfair conduct of the attorney representing the Respondents, one of whom was Francine Gargano, the attorney for Petitioner on this Petition.

The arguments that Petitioner was treated unfairly are factually baseless. This Court should therefore determine that such allegations do not support granting Petitioner's Petition for Writ of Certiorari.

IV.

THE LAW REGARDING *PRIMA FACIE* EVIDENCE OF A VIOLATION OF THE ADA IS CLEAR. THE TRIAL COURT CORRECTLY APPLIED THAT LAW DENIED PETITIONER'S MOTION *IN LIMINE* TO BE DECLARED A PREVAILING PARTY WITH REGARD TO HANDICAP ACCESS ISSUES UNDER THE ADA. REVIEW OF THIS ISSUE IS UNWARRANTED AND UNNECESSARY

Petitioner claims that he established a *prima facie* case of a violation of the ADA and that the trial court erred in denying the Motion *in Limine* made on his behalf and to declare him a prevailing party. In so doing, Petitioner mistakenly argued that the Respondents violated Title II of the Americans with Disabilities Act because at times he did not have access to handicap accessible bathrooms and the lifts in its buildings.

Title II of the ADA prohibits discrimination in public services and provides in relevant part that:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the

> benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity. 42 U.S.C. § 12131.

The keystone provision of Title II sets forth that: " . . . no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity." 42 U.S.C. § 12132. The term "public entity" is defined by the ADA to mean "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1). The very nature of a public school district as a special purpose district or instrumentality of local government,[8] necessarily means that a public school is a "quintessential 'public entity'" within the meaning of Title II of the ADA. *Block ex rel. Block v. Rockford Pub. Sch. Dist. # 205*, 01 C 50133, 2001 WL 1195757 (N.D. Ill. Oct. 10, 2001), *citing DeBord v. Bd. of Educ. of Ferguson-Florissant Sch. Dist.*, 126 F.3d 1102, 1106 (8th Cir. 1997), *cert. denied*, 523 U.S. 1073 (1998); *Bechtel v. E. Penn Sch. Dist. of Lehigh County*, CIV. A. 93-4898, 1994 WL 3396 (E.D. Pa. Jan. 4, 1994); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524 (3d Cir. 2007), *amended on reh'g* (Mar. 8, 2007).

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[8] *Swenson v. Lincoln Respondents No. 2*, 260 F. Supp. 2d 1136 (D. Wyo. 2003).

A Title II "public entity" must operate each service, program, or activity so that the service, program, or activity, when *viewed in its entirety*, is readily accessible to and usable by individuals with disabilities. However, a public entity is not necessarily required to make each of its existing facilities accessible to and usable by individuals with disability. NTS Am. Jur. 2d, *Americans with Disabilities Act: Analysis and Implications* § 284. A public entity may comply with the requirements of the ADA as to its existing structures by such means as "redesign of equipment, reassignment of services to accessible buildings, [and] delivery of services at alternate accessible sites" among others. 28 C.F.R. § 35.150. In choosing among available methods for meeting the accessibility requirements, a public entity will give priority to those methods that offer services, programs, and activities "in the most integrated setting appropriate." 28 C.F.R. § 35.150(b)(1). Should a public entity choose to achieve compliance through alteration of an existing facility or construction of a new facility, the work should meet the accessibility requirements of 28 C.F.R. § 35.151. In any event, a public entity is not required to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or an undue financial and administrative burden. 28 C.F.R. § 35.150.

Unlike Title III, which requires removal of architectural barriers whenever to do so would be "readily achievable," a public entity is not required to make

structural changes in existing facilities where other methods are effective in achieving compliance. If one facility is inaccessible, for example, a school can achieve compliance with the ADA by moving its services, programs, or activities to another facility that is accessible. *Parker v. Universidad De Puerto Rico*, 225 F.3d 1, 6 (1st Cir. 2000). Title II's emphasis on "program accessibility" rather than "facilities accessibility" was intended to ensure broad access to public services, while, at the same time, providing public entities with the flexibility to choose how best to make access available. *Id. See also*: *Matthews v. Jefferson*, 29 F. Supp. 2d 525 (W.D. Ark. 1998); *Schonfeld v. City of Arlsbab*, 978 F. Supp. 1329 (S.D. Cal. 1997). If a public entity has already achieved the "program accessibility" needed for Title II compliance, there is no further need to alter existing buildings.

Should a public entity seek to engage in new construction or alter an existing facility, then a different standard for compliance is applied. Newly constructed facilities (those built after Jan. 26, 1992), or parts of facilities, must be designed and constructed in a manner such that the facility or part of the facility is "readily accessible" to individuals with disabilities. 28 C.F.R. § 35.151(a). Each facility or part of a facility that is altered in a manner that affects or could affect the usability of the facility must, "to the maximum extent feasible", be made accessible to and usable by individuals with disabilities. 28 C.F.R. § 35.151(b). Alteration and construction should be in

conformance with the Uniform Federal Accessibility Standards (UFAS) (41 C.F.R. § 10 I-19.6, Appendix A) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADA) (28 C.F.R. Part 36, App. A). Design, construction, or alteration of facilities in conformance with Appendix A to 28 C.F.R. Part 36 allows for the facility to be deemed to comply with the requirements of 28 C.F.R. Part 35. In any event, however, a departure from either the UFAS or ADA standards is allowed when it is "clearly evident that equivalent access to the facility or part of the facility" is provided. 28 C.F.R. § 35.151(c).

In the present case, Respondents were obligated to make their services, programs and activities, when viewed in their entirety, readily accessible to and usable by handicapped individuals. The Respondents were not required to make each of its existing facilities fully accessible to and usable by handicapped individuals. So long as individuals suffering from disabilities and handicaps have access to the Respondents' services, programs and activities, the Respondents satisfied its ADA obligations.

Based upon the foregoing, it is respectfully submitted that the trial court properly found that whether Petitioner had access to the services offered by the Respondents was a factual issue for the jury. The jury ultimately concluded that the Respondents satisfied their obligations under Title II of the ADA.

The jury decision is supported by the weight of the evidence presented at trial.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that there are no questions of general public importance raised by this matter; that the rulings in this matter do not conflict with other decisions of this or any other court; and that the interests of justice do not require that this Court review this matter. Respondents respectfully request that this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

LINDABURY, MCCORMICK,
ESTABROOK & COOPER

Attorneys for Respondents

JOHN H. SCHMIDT, JR.

114

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No. 08-502

Supreme Court, U.S.
FILED
DEC 1 1 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

D.G., Guardian Ad Litem for J.G., a Minor,

Petitioner,

v.

NORTH PLAINFIELD BOARD OF EDUCATION, RICHARD GRECO, Director of Pupil Services, JANE DELANEY, Supervisor, Special Education, and MARILYN BIRNBAUM, Superintendent,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPERIOR COURT APPELLATE DIVISION

REPLY BRIEF

FRANCINE A. GARGANO
20 Shawnee Drive, Suite B
Watchung, New Jersey 07069
(908) 753-2079

Attorney for Petitioner

219956

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iii
OBJECTIONS TO PROCEDURAL HISTORY AS PRESENTED BY RESPONDENTS	1
CORRECTIONS TO RESPONDENTS' CLAIM OF FACTS SUBSTANTIATED AT TRIAL	2
I. REVIEW SHOULD NOT BE DENIED BECAUSE THE PETITION WAS FILED ON TIME	6
II. THE PETITION SHOULD NOT BE DENIED BECAUSE THERE ARE NO NECESSARY PARTIES TO BE JOINED	7
III. REVIEW SHOULD NOT BE DENIED BECAUSE PETITIONER CAN FACTUALLY AND LEGALLY SUBSTANTIATE HIS ALLEGATIONS OF UNJUST TREATMENT BY THE COURTS	8
A. JUDGE KUMPF DID ERR BY SEVERING THE CASE	8

Contents

Page

B. PETITIONER WAS FORCED TO SEEK A CHANGE OF VENUE AND THEREFORE IS NOT JUDICIALLY ESTOPPED FROM CLAIMING HE WAS TREATED UNFAIRLY 9

C. THE TRIAL COURT'S DEMEANOR IN THE COURTROOM WAS IMPROPER AND UNFAIR .. 10

IV. THERE WAS PRIMA FACIE EVIDENCE OF VIOLATIONS OF THE ADA AND REVIEW BY THIS COURT IS WARRANTED AND NECESSARY 11

CONCLUSION 12

TABLE OF CITED AUTHORITIES

Page

STATUTE

5 U.S.C. § 6103 7

RULES

Sup. Ct. R. 13.1 7

Sup. Ct. R. 13.2 7

Sup. Ct. R. 30.1 7

OBJECTIONS TO PROCEDURAL HISTORY AS PRESENTED BY RESPONDENTS

There are a few items in Respondents' rendition of the procedural history that need correction.

First, when Plaintiff requested an appeal of the decision of Judge Clark from the Office of Administrative Law (hereinafter OAL),[1] it was because the Defendants were trying to have the Plaintiff's school *PSYCHOLOGIST* testify about conversations she had with the Plaintiff in violation of the law and Plaintiff's rights.[2]

Second Defendants play fast and loose with the facts where they say that Plaintiff failed to appear before Judge Clark for the hearing. This is false. It was the Defendants who failed to appear before Judge Hoens in Superior Court even though they were provided notice by the Plaintiff's counsel. Additionally, knowing

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[1] Respondents try to make it sound like the Plaintiff did something improper by appealing Judge Clark's decision to the Superior Court when in fact it was procedurally correct and his absolute right to do so. The Appellate Division in their decision was incorrect that it should have been appealed to the Appellate Division. As Respondents' state correctly, appeal from a decision of the OAL is to the Superior Court. This was another error made by the New Jersey Appellate Court in deciding Plaintiff's case.

[2] The Defendants decided to change the school psychologist's title to guidance counselor when the appeal was made because guidance counselors are not under the same restrictions as psychologists.

the hearing was taking place in the Superior Court they proceeded to the OAL anyway to get a decision *in abstentia*. Judge Hoens had to put a stay on that proceeding which remained in effect for all those years until Judge Kumpf reversed everything that had been done by the Parties.

Third, the Superior Court case was with Judge Hoens until she was sent to the Appellate Division, then it went to Judge Gasiorowski. By that point, Defendants' insurance carrier was insolvent and new problems developed in the case.

Lastly, and probably the most important, is Defendants' insistence that the cases were only consolidated for settlement purposes. This is totally false and our position is substantiated in transcripts where it was laid out on the record with all counsel present that the consolidation was for trial purposes.

CORRECTIONS TO RESPONDENTS' CLAIM OF FACTS SUBSTANTIATED AT TRIAL

Respondents in their Reply Brief state that the Plaintiff's positions were not substantiated at trial. Twisted facts like Mr. Beckford worked for the Defendants for five years does not make clear that this was after he was taken away from working with the Plaintiff – not before –. The Defendants were to provide training of Mr. Beckford prior to the start of school which they failed to do.

There was testimony from the Plaintiff's aide and also his conductive educator about Mr. Beckford's

inability to properly care for the Plaintiff. Additionally, what the Defendants fail to tell the Court, is that the Plaintiff himself is very smart and articulate.[3] He was more than capable of laying out for the jury the indignities he endured at the hands of the Defendants. He testified to Mr. Beckford sleeping in class, refusing to take him to the bathroom and making him sit in his own urine and feces (which was substantiated by the conductive educator).

Everyone was aware of the chemicals poured all over the Plaintiff by the unqualified Mr. Beckford. Plaintiff's mother reported it immediately to the Principal, Mrs. Plewa, and it was also reported to DYFUS. DYFUS never followed up on the complaint because Mr. Beckford was removed from being Plaintiff's aide. DYFUS never said that Mr. Beckford was exonerated from any wrong doing.

It was the only one of Defendants employees who dared to tell the truth, Connie Fenner, who indicated that she had difficulty with the Defendants when it came to Plaintiff's tutoring and she outlined the hostility she encountered. This confirmed testimony of Plaintiff's mother.

Plaintiff's mother and attorney had to fight way before the due process petition discussed in this appeal was filed for every single thing that Plaintiff received.

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[3] Plaintiff was born with his intelligence which was nurtured by his family despite Defendants trying to take credit for same. Schools can only educate you; God gives you your intelligence.

Even when the school promised to do things like provide computers and computer equipment, they would delay the purchases causing problems for the Plaintiff.

The letter submitted at trial proved that Plaintiff was unwanted at Somerset School and that the Defendants were refusing to make the necessary accommodations. They can say whatever they want about it but that letter could not have been clearer and it was in harmony with the actions of the Defendants as outlined through the testimony of multiple witnesses.

Plaintiff did not receive adaptive physical education. Books on tape were not provided until after years of fighting and arguing.

Defendants like to argue that the Plaintiff's mother found the Middle School and High School physically acceptable. How can that possibly be true when the complaint filed in Superior Court made it clear that it was not acceptable. Defendants tried to argue at trial that she accepted the building but she did not that was why she was in the lawsuit to begin with. It was also why many attempts were made by the attorneys to resolve these issue through motions, mediation, settlement conferences, etc. So if it was all right with everyone, why were we in Court?

Defendants try to argue that the testimony was that they did not have to have their building ADA compliant because it was a public building. The fact that the lift

was not the right size[4], could not be operated independently by Plaintiff and was constantly broke made no difference according to Defendants. However that was not the testimony of Mr. Gaunt. It was his testimony that the equipment should have been adapted for the Plaintiff.

Despite what Defendants argue here, at trial, the records of their lift company, the testimony of Plaintiff, his aide, conductor, mother and even the janitor, substantiated the fact that there were constant problems with the lifts, which interfered with his schooling. The one lift was actually broken from April 15, 2005 until the end of October in the following school year. A video was presented at trial where his mother taped him in the elements because the lift was broken and he had to go outside the building and reenter through another door. The police were called to prevent her from taking the video tape to be used at trial.

Defendants try to make this Court (and the jury) believe that there was something abnormal about the Plaintiff's wheelchair. They portray it as if it is extremely large when in fact it is of standard weight and size for today's power wheelchairs. The lifts that had been put in previously were done to accommodate a student who came up through the ranks before the Plaintiff who was in a manual wheelchair.

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[4] There was testimony by Plaintiff and his aide that the lift actually broke, crashing to the ground while he was on it and causing him and the wheelchair to be wedged against the wall. The Plaintiff had to be lifted out by the janitors and then take his wheelchair out separately. This occurred because it was not the correct size for Plaintiff's wheelchair.

You notice that nowhere in Respondent's argument is there anything that contradicts the fact that they used evidence that was supposed to be excluded because of the severance of the cases. That's because they did and the Judge allowed it even though Plaintiff was precluded from doing likewise.

The Defendants try to taint this Court, like they did to the jury, by mixing IEP issues with ADA/LAD issues. They were not supposed to mix the two at trial, and Plaintiff was precluded from doing so, but the Defendants were not. They painted a picture to the jury that they were doing all of these wonderful things for the Plaintiff when in fact it was items they were required by law to do.

I. REVIEW SHOULD NOT BE DENIED BECAUSE THE PETITION WAS FILED ON TIME

Respondents try to play with this Court, waste this Court's time, the Appellant's time and money, by claiming that the Petition in this matter was untimely filed. In fact, that is not true.

The copy of the Order of the Supreme Court of New Jersey denying the Plaintiff's Petition was in fact never signed by Judge Rabner. The actual Order was apparently sent to the Clerk for filing without signature. Stephen Townsend, Clerk of the Supreme Court stamped and signed it as a true copy and also signed it on the signature line. Thus, the only Court action taken in this matter was when the Clerk of The New Jersey Supreme Court filed same and entered it on the docket. The date the Order was filed was on July 15, 2008.

Per Sup. Ct. R. 13.1 the Petition must be filed within 90 days "after entry of the judgment." It does not say 90 days after being signed by a Judge. It refers only to entry which in this case was when it was entered upon the docket. 90 days from July 15, 2008 was October 13, 2008. Respondents are correct about this. However, by Court rule, Columbus Day, which fell on October 13, 2008 this year, is a Court recognized holiday, see 5 U.S.C. § 6103. Thus, the Court is closed. Per Sup. Ct. R. 30.1 when a filing date falls on a weekend or Court holiday, the date for filing is the next week day in which the Court is open. In this case, October 14, 2008.

Therefore, the Petition in this matter was timely filed. Additionally, had the petition not be filed in a timely manner, the Clerk of the Court would have refused to accept same and that is not the case here. Sup. Ct. R.13.2 provides the clerk of the court "will not file any petition for a writ of certiorari that is jurisdictionally out of time." The Petition was docketed by this Court.

Given all of the facts, this Petition was filed on time and should not be denied.

II. THE PETITION SHOULD NOT BE DENIED BECAUSE THERE ARE NO NECESSARY PARTIES TO BE JOINED

Defendants make wild allegations about necessary parties not being joined but point to no decisions that state that the Superior Court or the State of New Jersey must be joined in this particular case. In fact, Defendants have been fighting these exact same issues both at trial level and beyond and have never once raised this issue.

When an appeal is taken initially, notice is provided to the Judge who sat below. That gives them the opportunity, if they feel it necessary, to bring in the State or Superior Court to represent them.

Lastly, there is nothing precluding the Defendants from joining these Parties if they believe they should be joined.

III. REVIEW SHOULD NOT BE DENIED BECAUSE PETITIONER CAN FACTUALLY AND LEGALLY SUBSTANTIATE HIS ALLEGATIONS OF UNJUST TREATMENT BY THE COURTS

A. JUDGE KUMPF DID ERR BY SEVERING THE CASE

The Defendants want to insist that Plaintiff was somehow at fault by not "exhausting their administrative remedies". In fact, the Plaintiff was injured by the cases being consolidated because the IDEA portion of the case was not resolved quickly and Plaintiff had to continue to endure the same problems year after year waiting for a trial in this matter.

The Defendants wanted the matters consolidated and it was only after their insurance carrier went into liquidation and a new attorney came in did the idea come about that the consolidation was wrong.

A terrible precedence has been established here whereby attorneys can delay cases through consolidation and then on the eve of trial have them again severed.

Additionally, there is nothing in the law that precludes the Superior Court from assuming jurisdiction, especially in cases like here where there were matters involving the ADA and NJLAD, as well as IDEA, and they overlapped.

Allowing this case to stand the way it has been decided will limit the jurisdiction of the State Courts and that was not intended by the act. If the legislature wants it to be that way, then the IDEA should be re-written to specifically state under no circumstances can a State Court hear these cases except upon appeal.

B. PETITIONER WAS FORCED TO SEEK A CHANGE OF VENUE AND THEREFORE IS NOT JUDICIALLY ESTOPPED FROM CLAIMING HE WAS TREATED UNFAIRLY

This reminds me of the witch trials where the woman would be submerged in water. If she somehow survived then that was proof she was a witch. She was then burned at the stake. If she died that was proof she wasn't a witch but she ultimately ended up dead anyway.

If Plaintiff had just accepted the fact that he could not testify from the jury box like everyone else, and instead testified from the floor, he sent the message to the jury that, 1) he was not worthy of the same treatment as people without disabilities, and 2) it was perfectly acceptable for people to treat him differently. Either way, that would have also meant that the treatment from the Defendants was acceptable.

Like the alleged witch, he chose to fight and asked to be transferred out of county – because he had no choice. Again, he was running the risk of the jurors seeing that he was being treated differently than everyone else due to the transfer but at least it wasn't in their face with him testifying from the floor while everyone else testified from the witness box which is elevated. Here everyone testified from the box on the floor.

What is really interesting is that Defendants cite Judicial Estoppel. Judicial Estoppel is precisely what precluded them from asking Judge Kumpf to dismiss Plaintiff's IDEA actions because of failure to exhaust administrative remedies and what precludes them from arguing here that his decision to sever the cases was correct. They cannot have it both ways.

C. THE TRIAL COURT'S DEMEANOR IN THE COURTROOM WAS IMPROPER AND UNFAIR

Plaintiff has pointed, and can continue to point, throughout the trial transcripts to where the Judge below discriminated against the Plaintiff and deliberately interfered with his presentation of the case.

We start with the way the Judge treated Plaintiff's wheelchair as if it was a nuisance. Plaintiff could not move around in his wheelchair without comments and nasty looks from both the Judge and Defendants' counsel. Defendants' counsel admitted to this on the record in oral argument before the New Jersey Appellate Division.

Then there were the comments from both the Judge and Defendants' counsel about Plaintiff's actions because he has difficulty controlling his emotions. This is part of his cerebral palsy and on the record counsel offered to get something from Plaintiff's doctors to substantiate this.

Counsel did object to the Judge's comments toward the Plaintiff and even requested that the Judge stop making comments to the jury about Plaintiff's need to leave the room (which was primarily due to the fact that he was accused of being disruptive by moving in his chair to get comfortable) and his movements.

IV. THERE WAS PRIMA FACIE EVIDENCE OF VIOLATIONS OF THE ADA AND REVIEW BY THIS COURT IS WARRANTED AND NECESSARY

How does one participate in school when they are told they are not allowed to go to that school? How do you claim that your services, programs and activities are readily accessible when you are told you can stay home and be tutored or be forced into a school other than where your peers are and they will give you a self contained classroom?

The letter from the Defendants to Plaintiff precluded him from going to school because the building was not ADA compliant. According to the ruling in this case, all educational institutions, and other public buildings as well, can preclude the disabled from their buildings by just saying it is not ADA complaint. How then are we going to make education inclusive for the disabled? We are not.

Defendants are arguing that they were under no duty to make accommodations for the Plaintiff to go to school, specifically, Somerset School, because the only time that would be their responsibility would be when there were renovations.[5]

The letter was prima facie evidence (even the Judge stated this during the trial) that Plaintiff's rights were violated. Yet, the jury came back with a verdict in favor of the Defendants. It then became the Judge's job to overturn that verdict.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

FRANCINE A. GARGANO
20 Shawnee Drive, Suite B
Watchung, New Jersey 07069
(908) 753-2079

Attorney for Petitioner

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[5] Of course, the Middle School and High School had such major renovations done to them and yet the bathrooms and lifts were not made ADA compliant and were not able to accommodate Plaintiff.